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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER J. THOMAS, *et al*,
Petitioners,

v.

MADELEINE ALBRIGHT, Secretary,
U.S. Department of State,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court provide a right of opt out in a certification only class action settlement agreement, under Fed. R. Civ. P. 23(b)(2), on the basis that the stage of monetary relief is more akin to a Fed. R. Civ. P. 23(b)(3) class action?

2. Is it a denial of due process to dismiss the claims of plaintiffs and plaintiff-intervenors in a Fed. R. Civ. P. 23(b)(2) certification only class settlement agreement without their consent?

3. May a court approve a certification only class action settlement agreement, which contains a provision nullifying the agreement, if modified by the court, and where class counsel has entered into a written side agreement which limits the information which class counsel may provide to the court, plaintiffs, and class members?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are Walter J. Thomas, Alan B. C. Latimer, Alfred H. Neal, Jr., Raymond G. Robinson, Mary Cynthia Smoot, and Anita Banks, as petitioners, and Madeleine K. Albright, Secretary of State, as respondent.

LIST OF PARTIES ON APPEAL TO THE DISTRICT OF COLUMBIA CIRCUIT UNITED STATES COURT OF APPEALS

The parties to the appeal, in the United States Court of Appeals for the District Of Columbia Circuit, were Walter J. Thomas, Alan B. C. Latimer, Anita Banks, Alfred H. Neal, Jr., Raymond G. Robinson, Mary Cynthia Smoot, Odie Fields, Johnnie Mary Miller, and Dorothy Watson, as appellees; Madeleine K. Albright, Secretary of State, as appellant; and Bernard Johns, representative of the class, as amicus.

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STATEMENT ON CITATIONS, JURISDICTION AND NOTIFICATION

1. *Citations*—The decision of the United States District Court, District Of Columbia, dated November 7, 1996, is reported at *Thomas v. Christopher*, 169 F. R. D. 224 (D. D. C. 1996). The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at *Thomas v. Albright*, 139 F. 3d. 227, 40 Fed. R. Serv. 3d. 558 (D. C. Cir. 1998). No other citations of this opinion have been made by any court or administrative agencies.

2. Review is sought, pursuant to Sup. Ct. R. 10 from the order of the United States Court of Appeals for the District of Columbia Circuit dated March 27, 1998. A Petition For Rehearing and Suggestion For Rehearing In Banc was denied on May 27, 1998.

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

4. The Solicitor General of the United States has been notified of the filing of this Petition for Writ of Certiorari by depositing a copy of this Petition for Writ of Certiorari in the United States mail, first class postage attached, addressed to the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Avenue, N.W., Washington, D.C. 20530.

STATUTES, REGULATIONS, AND OTHER AUTHORITIES

42 U.S.C. § 2000e-16, Nondiscrimination In Federal Employment (Pet. App. 181a-182a).

Federal Rules Of Civil Procedure Rule 23 (Pet. App. 183a-186a).

American Bar Association, Model Professional Rules Of Conduct, Rule 1.2 (Pet. App. 187a).

STATEMENT OF THE CASE

Walter J. Thomas, a petitioner herein, and Bernard Johns filed a class action in 1986 on behalf of themselves and all black Foreign Service Officers employed with the U.S. Department Of State, pursuant to 42 U.S.C. § 2000e-16, alleging discrimination based upon their race in promotions, assignments, evaluation of performance, termination, selection out, alleging an environment permeated with hostile racial remarks, and retaliation. The initial motion for class certification was denied. In 1988, twenty-eight (28) individuals were permitted to

intervene in the action. Alan B. C. Latimer, Raymond G. Robinson, Alfred H. Neal, Jr., and Mary Cynthia Smoot, black Foreign Service Officers and petitioners herein, were granted the status of intervening plaintiffs in the district court, Pet. App. 22a. On June 15, 1994, a motion seeking class certification, pursuant to Fed. R. Civ P. 23(b)(2) or, in the alternative, 23(b)(3), Pet. App. 2a.

The parties engaged in discovery and entered into settlement discussions. On January 31, 1996, counsel for the parties notified the district court, that a proposed settlement had been reached. The district court scheduled a hearing for preliminary approval for March 20, 1996. Petitioners filed objections to the preliminary approval.

The proposed settlement agreement sought class certification, pursuant to Rule 23(b)(2), of a class encompassing all black Foreign Service Officers employed from January 20, 1984 until March 22, 1996, Pet. App. 78a; dismissed all claims based upon race discrimination which had arisen or may have arisen during the period covered by the agreement, Pet. App. 78a; granted 17 promotions to individuals, Pet. App. 79a-80a; prohibited individuals who accepted promotions from receiving monetary relief, Pet. App. 114a; prohibited individuals from seeking promotion relief unless identified by counsel for the parties, Pet. App. 80a; provided that four individuals identified by counsel for the parties would be reinstated to nontenured employment, Pet. App. 81a-82a; provided for 3.8 million dollars in promotion and termination damages, Pet. App. 78a-79a; provided for a Diversity Training program, a Council For Equality In The Workplace, and revision of the performance evaluation form, Pet. App. 82a, 87a, 91a-92a; provided that the agreement was null and void if modified by the court, Pet. App. 111a; and provided for 2.1 million dollars in attorney fees, Pet. App. 106a. The counsel for the parties entered into a separate written agreement, which required counsel for the plaintiffs and

the class to inform the district court that the settlement was fair and reasonable and prohibited providing any information to individuals on the matter of opting out of the agreement, Pet. App. 178a-179a. This written agreement was not provided to the district court or the plaintiffs and class members until after the final approval of the settlement agreement, Pet. App. 172a-177a.

The district court granted preliminary approval and scheduled a fairness hearing for July 15, 1996. The district court conducted fairness hearings on July 15, 1996, July 22, 1996, and July 23, 1996.

On November 7, 1996, the district court granted approval of the proposed settlement agreement, certifying a class pursuant to Rule 23(b)(2) and granting the right to sixteen class members to opt out, on the basis that the damages stage of the action was more akin to a Rule 23(b)(3) action and that individual rights might be unfairly extinguished without such a right, Pet. App. 56a. All petitioners in this proceeding filed individual actions in the district court in October, 1997.

The Department Of State, respondent herein, appealed the order of the district court and the petitioners filed a cross-appeal. The United States Court Of Appeals for the District Of Columbia Circuit issued an order on March 27, 1998 affirming the district court approval of the settlement agreement; reversing the district court's ruling on the issue of the right of individuals to opt out of the agreement; and ordering that the agreement be binding on all individuals including petitioners, Pet. App. 19a. The District Of Columbia Circuit held that provisions of the agreement awarding promotions were fair and reasonable, since it would have been difficult to determine individual class members entitled to a promotion, Pet. App. 7a-8a. The court held that petitioners had no standing to object to the reinstatements because they were tenured employees, Pet. App. 9a. The court held that the

provisions, prohibiting modification of the agreement by the court and proscribing the information to be given on the right to opt out and the nature of the settlement, were not indicative of class counsel acting adversely to the interests of the class, Pet. App. 10a-11a. In addition, the court held, that to permit opt out of a Rule 23(b)(2) class action, the district court was required to make findings sufficient to meet the requirements of Rule 23(b)(3) and that individual claims for money damages would not entitle plaintiff and plaintiff-intervenors to the right to opt out, Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS REQUIRES A RIGHT TO OPT OUT OF A RULE 23(b)(2) CLASS ACTION WHICH SEEKS MONEY DAMAGES

This case presents a question which has not previously been decided by this Court and on which the circuit courts are divided. A conflict has developed in the circuits as to whether due process under Fed. R. Civ. P. 23(b)(2) requires the right to opt out of a class action settlement, when both declaratory relief and monetary relief are sought.

The Second Circuit Court of Appeals has held that due process requires providing members in a Rule 23 (b)(2) action, involving money damages, the right to opt out, based merely on a written statement requesting exclusion, *Plummer v. Chemical Bank*, 668 F. 2d 654, 657 n. 2, 27 F. E. P. Cases (BNA) 1169, 33 Fed. R. Serv. 2d (Callaghan) 391 (2nd Cir. 1982). The Fifth Circuit Court of Appeals in *Pettway v. American Cast Iron Pipe* (Pettway, Ill), 494 F. 2d 211, 263 n. 154 (5th Cir. 1974), *remanded for further proceedings*, 576 F. 2d 1157, (5th Cir. 1978), cert den., 439 U.S. 1115, 99 S. Ct. 1020, 59 L. Ed. 2d 74 (1979); the Ninth Circuit Court of Appeals in *Brown v. Ticor Title Insurance Co.*, 982 F. 2d 386, 392 (9th Cir. 1992), *cert. dis-*

missed, sub nom. Ticor Title Insurance Co. v. Brown, 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994); the Eleventh Circuit Court of Appeals in *Holmes v. Continental Can Co.,* 706 F. 2d 1144, 31 F. E. P. Cases (BNA) 1707, 1154, 36 Fed. R. Serv. 2d (Callaghan) 817, (11th Cir. 1983) and the District of Columbia Circuit Court of Appeals in *Eubanks v. Billington,* 110 F. 3d 87, 94, 37 Fed. R. Serv. 3d (Callaghan) 691 (D.C. Cir. 1998) have adopted the rule, that at the monetary relief stage of a Rule 23(b)(2) class action, due process requires providing the right to opt out to individuals. The Second Circuit Court of Appeals in *County of Suffolk v. Long Island Lighting Co.,* 907 F. 2d 1295, 1305, (2nd Cir. 1990), held that basic fairness supported an entitlement to opt out of a Rule 23(b)(1) limited fund action. The Fourth Circuit Court Of Appeals held in *A. H. Robins Co., Inc.,* 880 F. 2d 709, 744-745 (4th Cir. 1989) that opt-out, although not required, should be granted to ensure "fundamental fairness," in mandatory Rule 23 actions involving money damages.

The Third Circuit Court of Appeals in *Wetzel v. Liberty Mutual Ins. Co.,* 508 F. 2d 239, 254-256, 9 F. E. P. Cases (BNA) 211, 19 Fed. R. Serv. 2d (Callaghan) 1073 (3rd Cir. 1975) and *Real Estate Title and Settlement Services Antitust Litigation,* 815 F. 2d 695 (3rd Cir. 1987), *aff'd. without opinion,* held that due process did not require a right to opt out of a Rule 23(b)(2) action even though substantial monetary relief was recovered. The Sixth Circuit Court of Appeals in *Laskey v. United Automobile Workers, International Union,* 638 F. 2d 954, 956, (6th Cir. 1981) held that failure to provide a right to opt out in a Rule 23(b)(2) action, which provides monetary relief, is not a violation of due process. *See also Kincade v. General Tire and Rubber Co.,* 635 F. 2d 501, 507, 24 F. E. P. Cases 1693, 25 Emp. Prac. Dec. (CCH) P31,517 (5th Cir. 1981).

Brown, supra at 982 F. 2d 392 (9th Cir. 1992) held, relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), *mandamus denied* 487 U.S. 1223 (1988), that in order to bind class members for claims of money damages, minimal due process required providing a right for individual class members to opt out of a settlement in a Rule 23(b)(2) action. This Court, after granting certiorari to consider the constitutional due process issue, dismissed the writ as improvidently granted, holding that the Court should consider the due process requirement under Rule 23, prior to deciding a constitutional question.

Rule 23 of the Federal Rules of Civil Procedure is a codification of equity law, which permitted representatives to maintain actions involving common questions affecting many individuals. The Rule requires that all actions, which seek to be maintained as class actions, meet the prerequisites set forth in subdivision (a) of the Rule. The criteria stated in Rule 23(a) are mandatory, and no action may be certified as a class action, if the criteria are not met, *Amchem Products, Inc. v. Windsor*, —— U.S. ——, 117 S. Ct. 2231, 2245, 138 L. Ed. 689, 37 Fed. R. Serv. 3d (Callaghan) 1017 (1997).

In the present case both the district court and the District Of Columbia Circuit held, in approving the settlement, that the proposed class met the requirements of Rule 23(a), Pet. App. 12a-13a, 39a-42a. A class certification hearing was not conducted in this action, since settlement was proposed simultaneously with class certification, Pet. App. 38a.

In assessing the requirements of Rule 23(b), the district court concluded that the action was appropriately a Rule 23(b)(2) action; and, relying on *Holmes, supra,* provided an opt out right, to individuals, finding the damages stage of the action was more akin to a Rule 23(b)(3) action, Pet. App. 56a. The District Of Columbia Circuit rejected this finding, holding, that in a Rule 23

(b)(2) class action, the district court must certify a hybrid class action, or find that the claims of the class members are unique or sufficiently distinct, in order to permit opt outs, *Thomas, supra,* at 139 F. 3d 248-249.

The ruling of the District Of Columbia Circuit, is contrary to this Court's ruling, in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 n. 3 (1985) which held that due process requires providing a right to opt out of actions, that seek to bind known plaintiffs for claims of money damages. This Court's ruling, in *Shutts, id.*, has been extended by the circuit courts to mandatory class actions seeking declaratory relief and money damages, pursuant to Rule 23. The ruling, of the District Of Columbia Circuit, by imposing the criterion of certification of a hybrid action or a determination that the claims of the individuals are unique, attempts to create a new subdivision under Rule 23(b)(2) which is not contemplated by the rule and is contrary to this Court's decision in *Shutts, id.* This criterion appears to be an attempt to impose the requirements of Rule 23(b)(3), as a certification requirement of a Rule 23(b)(2) class action. This Court firmly rejected any efforts of court ordered modification of the requirements of Rule 23 in *Amchem, supra.* 113 S. Ct. 2248.

Rule 23 provides a specific right of opt out in all actions certified under Rule 23(b)(3). Courts, however, with the advent of civil rights actions and mass tort litigation seeking monetary damages, have granted the right to opt out of Rule 23(b)(1) and (b)(2) actions, under the provisions of Rule 23(c), (d), and (e), which provide for the court's authority to manage the conduct of the action, Pet. App. 184a-186a. Courts which have considered the matter have held that Rule 23 is to be liberally construed, and is flexible enough to permit a court to provide opt out rights in mandatory class actions, *Eubanks, supra* at 110 F. 3d 87, 94. George Rutherglen in, "Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions," 71 N. Y. U. L.

Rev. 258, 260, 285 (1996), has suggested that the right to opt out of a class action is a substantive right of due process, which cannot be eliminated or diminished by procedural rules such as the Federal Rules Of Civil Procedure. Rutherglen's analysis relied upon the Rules Enabling Act, 28 U.S.C. § 2072(b) which precludes amendment of substantive rights through the Federal Rules of Civil Procedure. Herbert Newberg & Alba Conte, 2 Newberg On Class Actions, ¶ 4.17, at pp. 4-56 to 4-57 (3rd ed. 1992), has recommended that, even in the absence of a specific reference in Rule 23 requiring opt outs in class actions under Subdivisions (b)(1) and (b)(2), a court should provide opt out, when money damages are recovered. Both commentators premise their views on the fact that money damage claims are property, of which an individual may not be deprived without due process of law. The majority of courts which have provided the right to opt out of (b)(2) actions which involve money damages have based their rulings, on the premise that money damages are particularly individual in nature and each individual has a property interest in their claim. *See, Plummer, supra, Pettway supra, Holmes, supra, Brown, supra* and the decision of this Court in *Schutts, supra.*

The ruling of the District Of Columbia Circuit, which has bound the petitioners to a settlement agreement when no class has been previously certified, highlights the need for inclusion of due process rights under Rule 23. In the present case, the district court and the circuit court had limited information on the individual claims of the petitioners. No class certification hearing had been held, which would have provided the detailed information on individual claims as to monetary relief in this case. The District Of Columbia Circuit ruling, which bound the petitioners without a class certification hearing, is the very kind of "Chancellor's foot," approach which this Court condemned in *Amchem, supra,* 117 S. Ct. 2248. As Justice O'Connor noted in writing for

the dissent in *Ticor Title Insurance Co. v. Brown, supra* at 511 U.S. 123.

"Unless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damages claims; the constitutional opt-out right announced by the court below will be implicated in every such action. . . ."

The ruling of the District Of Columbia Circuit points up the need to address the issues which the majority of this Court believed, in *Ticor id.*, could not be reached because of the res judicata posture of that case. Increasingly, parties are using the settlement only certification process to resolve disputes. Left unchecked and without guidance, parties may come to court with agreements which dissolve individual rights, and leave courts, without sound legal ground, to resolve these matters. The ruling of the District Of Columbia Circuit is the case in point: it not only binds petitioners for individual money damages, but also adds new criteria to the provisions of Subdivision (b)(2) of Rule 23, by requiring parties to show that they have some uniqueness to their claims, to prevent their being included in the settlement of a Rule 23(b)(2) action.

This case presents the critical issue, which this Court declined to reach in *Ticor, supra,* 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33, of whether under Rule 23 due process requires the right to opt out of a Rule 23(b)(2) class action which seeks money damages as well as declaratory and injunctive relief.

II. INDIVIDUAL CLAIMS OF PLAINTIFFS AND PLAINTIFF-INTERVENORS MAY NOT BE DISMISSED IN A CLASS ACTION SETTLEMENT AGREEMENT WITHOUT THEIR CONSENT

The proposed settlement agreement in this action, without regard to the objections of petitioners, granted relief

entitled "Individual Relief," to the claims of the plaintiff and plainitff-intervenors, Pet. App. 79a-80a, 113a. The petitioners, excepting Anita Banks who was a class member, did not agree to settle their individual claims and rejected the settlements proposed as their individual relief, Pet. App. 144a, 145a-146a, 152a-153a, 163a-164a, 167a-169a. The district court permitted the objecting petitioners to opt out of the settlement agreement, Pet. App. 54a. The ruling of the District Of Columbia Circuit binds the petitioners to a settlement of their individual claims without their consent, Pet. App. 19a. The decision gave no rationale for binding the petitioners, whose claims included termination, reinstatement, promotions to the Senior Foreign Service, retaliation, and money damage claims which were not addressed by the proposed settlement agreement, Pet. App. 3a, 22a, 49a. The record before the circuit court was limited to the statements of counsel, with no supporting evidence, and the testimony of one witness, Kerry Kirkland, who testified that he had not conducted any factual examination of the petitioners' claims, Pet. App. 138a-142a.

The decision of the District Of Columbia Circuit is in conflict with this Court's decision in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 1 (1984). *Cooper, id.*, at 467 U.S. 879-880, held that a judgment in a properly litigated class action effectively precludes any relitigation of the class claims, but may not preclude individual claims from being litigated by plaintiffs and plaintiff-intervenors. This principle has even greater application in a case, in which no trial has been held and no class has been certified, prior to settlement. In *Mandujano v. Basic Vegetable Products, Inc.*, 541 F. 2d 832, 834 (9th Cir. 1975), the Ninth Circuit held that a class is not . . . "[A] legal entity to which any individual plaintiff's legal rights are to be sacrificed." As set forth in *Pettway, supra* (Pettway IV), 576 F. 2d 1157, 1177, attorneys may not ignore

the wishes of their clients concerning major litigation decisions. The ABA Model Rules of Professional Conduct, Rule 1.2 (a) provides that a lawyer shall abide by a client's decision as to whether to accept an offer of settlement of a matter. Pet. App. 187a. In the present case, the attorneys for the class sought to resolve individual claims of the petitioners, despite their objections. The district court appropriately permitted the petitioners to opt out of the settlement agreement, since any approval of their individual claims over their objection would have compromised their claims without their consent.

Deposit Guaranty National Bank of Jackson v. Roper, 445 U.S. 326, 347, 100 S. Ct. 1166, 63 L. Ed. 2d 427, *reh'g denied*, 446 U.S. 947 (1980) is further support for the extent of the rights of plaintiffs in a class action. This Court held that even a tender of a full settlement offer to plaintiffs in a class action, did not moot the plaintiffs' rights to appeal the class aspects of their claims on which they had been unsuccessful. As stated in *Pettway IV*, *supra* 576 F. 2d 1176, class counsel may not use a plaintiff to gain entry to the courthouse door and dispose of the plaintiff once entry has been accomplished. Plaintiffs and plaintiff-intervenors, as set forth in *Cooper*, *supra* and *Deposit Guaranty*, *supra*, have a special interest and stake in the litigation which may not be summarily subsumed by the court or counsel for the parties.

The decision of the District Of Columbia Circuit ignores the fact that petitioners were plaintiff and plaintiff-intervenors, and relegates them to the status of "dissident class members," Pet. App. 6a. A status which is not supported by the record or the law. *Cooper*, *supra*, at 467 U.S. 877-878, specifically rejected such an application of Rule 23, holding that classwide relief could not dispose of a valid individual claim.

The ruling of the District Of Columbia Circuit improperly denies plaintiffs and plaintiff-intervenors in class

actions, substantive rights to which they are entitled based upon this Court's decisions in *Cooper, supra* and *Deposit Guaranty, supra.* Without review, the circuit court decision will permit the dismissal of individual claims of plaintiffs and plaintiff-intervenors in settlement agreements pursuant to Rule 23 without their consent.

III. THE REQUIREMENT OF ADEQUATE REPRESENTATION BY COUNSEL FOR THE CLASS MAY NOT BE SATISFIED BY AN ASSESSMENT THAT A SETTLEMENT IS FAIR

Counsel for the class and the respondent in this action, on March 19, 1996, entered into a written agreement which obligated the counsel for the class to inform the court that the proposed settlement agreement was fair and reasonable, and that no information would be provided to members of the class on their right to opt out of the action, Pet. App. 178a-179a. The written agreement was not shared with the petitioners, class members, or the district court during the approval process, Pet. App. 172a-177a. The District Of Columbia Circuit held that a provision of the settlement agreement, which prohibited modification of the agreement by the court, and the written inside agreement were not evidence, of counsel for the class acting adversely to the interest of the class, but were merely evidence of the parties attempts to strike a global compromise, Pet. App. 11a.

Rule 23(a)(4) provides that class representatives, including counsel for the class, must adequately protect the interests of the class. *Amchem, supra,* held that in certification only settlement agreements, Rule 23(e) requires that a court assure that the requirements of Rule 23 are met, and that fairness may not be the basis for approval of a class action settlement, 117 S. Ct. 2248. The Ninth Circuit in *Ficalora v. Lockheed California Co.*, 751 F. 2d 995, 997 (9th Cir. 1985), held that a court must examine settlements to assure that a proposed agreement is

not the result of fraud, overreaching, or collusion. *Pettway IV*, 576 F. 2d 1176-1177, held that an attorney representing a class is under a duty to inform the court of any conflicts so that a court may take appropriate steps to protect the interests of a class.

In the present case, the counsel for the class did not reveal the written agreement to the petitioners or the court, thereby depriving the district court of the opportunity to determine whether the agreement constituted a compromise which was adverse to the interests of the class and the petitioners. The terms of the written agreement proscribed, the type of representation which counsel for the class could present to the district court on the settlement agreement, and proscribed representation, which could be provided, to class members by counsel for the class. The decision of the District Of Columbia Circuit that this was fair, as part of a global effort at compromise, does not meet the requirement that a court determine adequacy of representation under Rule 23(a)(4) to assure that conflicts of interest do not exist between class representatives, class counsel and the class. Nothing in Rule 23 provides that a party may sacrifice the rights of petitioners and class members to adequate representation in order to achieve a ". . . global compromise. . . . Pet. App. 11a. This Court specifically rejected fairness as the support for satisfying a requirement of Rule 23 in *Amchem, supra.* 117 S. Ct. 2249.

The ruling of the District of Columbia Circuit is contrary to *Amchem, supra*, and bears on the important issue of the duty of adequate representation pursuant to Rule 23 in a settlement only class certification agreement. Failure to provide review will permit parties to enter into written side agreements which are never submitted to courts for review.

CONCLUSION

The petitioners submit that the issues presented for review bear on important rights of parties to class actions under Rule 23(b)(2). The practice of parties filing class actions and settling the matter prior to class certification has established a critical need for guidance from this Court to the circuits on the limitations and rights of plaintiffs and class members whose claims are resolved by certification only settlement agreements under Rule 23 of the Federal Rules Of Civil Procedure.

Petitioners respectfully request that this Petition For Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 13, 1997 Decided March 27, 1998

No. 97-5004

WALTER J. THOMAS, *et al.*,
Appellees/Cross-Appellants

v.

MADELEINE K. ALBRIGHT,
Secretary of State,
Appellant/Cross-Appellee

Consoldated with 97-5018

Appeals from the United States District Court
for the District of Columbia
(No. 86cv02850)

Before: EDWARDS, *Chief Judge*, GINSBURG, *Circuit Judge*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: This is a Title VII class action in which the plaintiffs allege that the United States Department of State discriminated against African-American Foreign Service Officers. The Department and

a group of nine class members separately appeal from the district court's approval of the class settlement. The Department appeals the district court's decision to permit class members to opt out of the class settlement. The nine cross-appellants challenge the district court's approval of the consent decree as fair and reasonable. We affirm the district court's decision that the consent decree is fair and reasonable, but reverse its decision allowing opt-outs.

I. Background

In 184 Walter J. Thomas, a former Foreign Service Officer, filed an admininstrative complaint on behalf of himself and other African-American FSOs, alleging racial discrimination in the Department's employment practices. In 1986, after the Department had rejected Thomas' complaint, he and another former FSO filed a class action complaint in district court alleging that the Department engaged in racially discriminatory employment practices and retaliated against those who complained about them. *Thomas v. Christopher*, 169 F.R.D. 224, 229 (D.D.C. 1996).

The plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b)(2). The court denied their motion but permitted the plaintiffs to file an amended complaint adding several more plaintiffs. The parties conducted discovery for six years and, beginning in 1993, engaged in settlement negotiations, eventually under the supervision of a magistrate judge. In 1994 the plaintiffs filed another motion for class certification, in which they contended that although their class could be certified pursuant to Rule 23(b)(3), "it is more appropriately maintained as a Rule 23(b)(2) class action." The court deferred ruling upon this motion pending the outcome of the settlement negotiations.

In 1995 the parties reached a settlement in principle, and in January 1996 they signed a consent decree. The

sonsent decree "resolves all claims that were or could have been brought" by African-American FSOs between 1984 and 1996 based upon racial discrimination in promotions, awards, tenuring, termination, performance reviews, assignments, and training, or upon retaliation for complaining about such discrimination. The parties agreed that the court would certify the class pursuant to Rule 23(b)(2).

The consent decree provided for the following relief:

(1) Monetary Relief—The Department agreed to pay a total of $3.8 million, to be allocated as follows: (a) $125,000 for the named plaintiffs ($40,000 to Thomas for "his leadership and coordinating role" and $85,000 divided equally among the 29 other named plaintiffs); (b) $2.9 million for those who experienced delays in and denials of promotions, to be allocated upon the basis of a formula specified in the consent decree, but not to class members who would receive a promotion under the consent decree or who had been promoted at the same rate as white employees; and (c) $775,000 for class members who had been terminated, of which at least $200,000 was to be distributed formulaically to those who were either terminated for unsatisfactory performance or constructively discharged, and up to $575,000 of which was reserved for a maximum of four recipients to be chosen upon the basis of, among other things, the severity of the discrimination and the degree of economic hardship they had suffered.

(2) Promotions—The Department agreed to give retroactive promotions to the 16 mid-level class members and to the one senior-level class member who had been at their current grade-levels for the longest time and had been recommended previously for promotion.

(3) Reinstatement—The Department agreed to offer a new five-year appointment to each of four class members who had been fired when they failed to get tenure within the required time.

(4) Injunctive and Prospective Relief—The Department agreed to: (a) submit to an injunction against its discriminating on the basis of race or retaliating for equal employment opportunity activities; (b) create a Council for Equality in the Workplace to monitor the EEO activities of the Department; (c) modify its employee evaluation reports and engage a consultant to help determine whether further revisions are necessary; (d) revise and expand its diversity and EEO training; (e) establish a working group to monitor the grant of awards to employees; (f) use its best efforts to include an African-American on any board considering an African-American for termination; (g) continue development of an electronic personnel database to monitor employment actions; (h) report employment and EEO information to class counsel for four years; and (i) adopt an affirmative action plan approved by the Equal Employment Opportunity Commission.

(5) Attorneys' Fees—The Department agreed to pay $2.1 million in attorneys' fees, plus an additional amount for any services rendered after the district court's preliminary approval of the consent decree.

Class counsel and the Department also entered into a letter agreement providing that (1) the consent decree would not address the issue of opt-outs; and (2) class counsel would (a) support the settlement in court as "fair and reasonable to the class as a whole"; (b) not take a legal position regarding opt-outs other than to advise the court that it "may have the discretion to allow opt outs"; and (c) not advocate that class members opt out.

In March the district court held a two-day hearing and preliminarily approved the consent decree. The court then ordered that the consent decree and notice of the fairness hearing be sent to all known class members. 169 F.R.D. at 231. The notice advised class members that the court

might grant them the right to opt out. Of 359 class members, 34 wrote the court in support of the consent decree and 55 wrote in opposition. *Id.* at 235.

In June class members were informed of their individual awards under the consent decree. The Department, as agreed, retroactively promoted 17 class members and reinstated four. It awarded an average of $10,900 in promotion damages to 265 class members. Twenty-nine class members received an average termination award of $16,400, and the four class members who had incurred the greatest injuries received an average termination award of $75,000. *Id.* at 234-35.

At the fairness hearing later that month 14 class members testified; three supported the consent decree,, eight opposed it, and three were "ambivalent or neutral." *Id.* at 235. The court required the Department to send notices to opponents of the agreement informing them that if they wished to opt out then they had to file a motion stating "the reasons for this request, and any law" supporting it. Of the nineteen class members who filed motions to opt out all but nine chose ultimately to remain in the class.

The court certified the class under Rule 23(b)(2) and approved the consent decree pursuant to Rule 23(e). The court found that the settlement was "negotiated at arm's length and presents no danger of collusion"; it then held that the consent decree was fair and reasonable in light of the disputed evidence and the risks of litigation. Nonetheless, the court allowed those class members so desiring to opt out of the consent decree. *Id.* at 239-44.

II. Analysis

The Department of State appeals the district court's decision permitting opt-outs, while the cross-appellants, nine members of the plaintiff class, object to the court's approval of the consent decree. Class counsel submitted a

brief in support of the consent decree but did not take a position concerning the dissident's right to opt out.

A. Fairness of the Consent Decree

Rule 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the court." Before it can approve a settlement a district court "must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977); *see Isby v. Bayh,* 75 F.3d 1191, 1196 (7th Cir. 1996); *Van Horn v. Trickey,* 840 F.2d 604, 606 (8th Cir. 1988); *Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 22 (2d Cir. 1987). The court's primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case. *See, e.g., Isby,* 75 F.3d at 1199. The court should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial. *See EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir. 1985); *see also United States v. Trucking Employers, Inc.,* 561 F.2d 313, 317 (D.C. Cir. 1977).

The dissident members of the class in this case contend that for a host of reasons the district court abused its discretion in approving the consent decree as fair. We conclude, to the contrary, that the settlement is eminently fair and reasonable to the class as a whole.

First, with respect to the class-wide relief the dissidents complain that the consent decree does not (1) alter the Department's allegedly discriminatory assignment system, (2) give any "relief for retaliatory acts taken by the Department," or (3) provide for the expungement of employee records infected with discrimination. In making the first two charges the dissidents seem oblivious to the significant monetary, reinstatement, and promotional relief awarded to class members who claim the Department dis-

criminated or retaliated against them. Moreover, the injunction prohibits discrimination in general and in assignments in particular, forbids retaliation, and prescribes monitoring procedures so that class counsel can ensure the Department complies. Together these provisions of the consent decree both redress past and deter future discrimination in assignments and inhibit future retaliation. Finally, although the consent decree does not provide for expungement of employee records potentially tainted by discrimination, it does require revisions to the employee evaluation reporting form in order to help prevent racial discrimination in the future.

Second, the dissidents argue that the consent decree is inadequate with respect to the compromise of claims regarding discrimination in promotions. While the district court found no statistically significant evidence of such discrimination in the junior and senior grades, the plaintiffs did present statistical evidence suggestiing that there had been between 40 and 47 fewer promotions, primarily in the mid-level grades, than there would have been but for discrimination. The Department presented its own statistical evidence suggesting that the shortfall was at most 10 promotions. The district court reasonably determined that in view of the conflicting evidence, the compromise calling for 17 promotions was fair and reasonable. Moreover, those who were not awarded a promotion received monetary compensation for delays in and denials of promotions.

Relatedly, the court did not abuse its discretion in approving the provision of the consent decree calling for only one promotion to be made in the senior grades; there was no statistically significant evidence of any shortfall of promotions in those grades. Nor did the district court abuse its discretion when it concluded that the consent decree was fair in awarding retroactive promotions only to those active FSOs who had been at their current grade

the longest and who had been recommended for but not granted a promotion. To determine which individual class members would have been promoted but for discrimination would have been difficult for all concerned, wherefore we cannot say that the quick and dirty alternative upon which the parties settled was unreasonable. We reject also the dissidents' contention that it was unfair not to provide any monetary award to those who received a promotion. A settlement necessitates compromise, and the agreement that some individuals would get a promotion while others would get cash is not an unreasonable way to allocate two scarce resources.

Third, the dissidents contend that the consent decree is insufficient regarding reinstatement. They argue that (1) four reinstatements was too few; (2) the reinstatements went only to employees who were terminated when they failed to get tenure and not to tenured employees who were terminated for allegedly poor performance; and (3) those who were reinstated should have received tenured positions rather than returning as untenured employees. The parties presented conflicting evidence regarding whether there was a statistically significant excess in the number of African-American employees terminated. The Department's expert argued that employees terminated when they did not get tenure should be treated separately from tenured employees fired for performance-related reasons because the two types of adverse decisions are unrelated. Nonetheless, the Department's expert opined that terminations of neither tenured nor untenured African-American employees were significantly above the norm.

We conclude that the district court properly held both that four was a reasonable number of reinstatements and that the agreement limiting reinstatement to those who were terminated for failing to reach tenure was fair in light of the parties' competing statistical analyses and the risks attendant to litigation. Further, although the number of reinstatements was limited to four, 29 of the 30 em-

ployees who applied for termination damages received a monetary award. Again, the dissidents have not shown that this division of the settlement proceeds is unreasonable considering the interests of the class as a whole. As for the reinstatements being without tenure, none of the dissidents appears to be among those reinstated; therefore, the dissidents do not have standing to pursue this particular objection to the class settlement. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1181 (5th Cir. 1978) ("[A]ppellants who were excluded from the subclass and denied back pay lack standing to contest the adequacy of the awards received by other class members").

Fourth, the dissidents appear to complain that they did not receive sufficient monetary relief. We conclude, however, that the district court did not abuse its discretion in approving as fair, adequate, and reasonable the amount of the damages provided in the consent decree. Class counsel estimated the Department's overall exposure to liability at from $2.5 million to $4 million while the Department put the figure at from $725,000 to $1.5 mililon; each side had reasonable arguments for its position. Based upon the conflicting evidence and arguments, the risks of litigation, and the time value of money, the district court reasonably determined that the $3.8 million upon which the parties had settled was "at the high end" of what the class could haxe expected after trial. The dissidents complain that the settlement "unfairly limited monetary relief for egregious acts of discrimination to four persons." The dissidents provide no reason why it was unfair to award an average of $75,000 in damages to the four most significantly injured of the terminated class members. A claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; as we indicated above, a settlement necessitates compromise.

Fifth, the dissidents argue that it was improper for the court to approve the settlement over the objections of a

large number of class members, including several of the named plaintiffs. But a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *See Grant*, 823 F.2d at 23; *Hiram Walker*, 768 F.2d at 891-92; *Cotton*, 559 F.2d at 1331; *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975); *cf. Pettway*, 576 F.2d at 1215-17 (acknowledging general rule but holding settlement unfair where approximately 70% of class and all named plaintiffs objected). Here only 15% of the class members objected; 85% accepted the settlement, and many of them actively supported it. The district court did not abuse its discretion, therefore, in approving the settlement in spite of some opposition.

The dissidents cite *Ficalora v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), and *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976), for the proposition that it is an abuse of discretion for a district court to approve a settlement over the objection of the named class members. The teaching of those cases, however, is that the district court must consider the objections raised by the named plaintiffs. *Ficalora*, 751 F.2d at 997; *Mandujano*, 541 F.2d at 836-37. In *Mandujano* the court also said that the opposition of a significant number of named plaintiffs "is a factor to be considered when approving a settlement." 541 F.2d at 837. Here the district court conducted hearings and permitted all interested parties, including the dissidents, to testify. The court considered the objections of the plaintiffs but pointed out that "the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled." 169 F.R.D. at 243. The district court's decision is therefore consistent with the Ninth Circuit cases cited.

Finally, the dissidents argue that class counsel did not act in the interest of the class when counsel agreed to

argue that the consent decree was fair and not to advocate the right to opt out, and agreed to the provision of the consent decree stating that the court may not modify the agreement. In our view counsel more than adequately represented the class as a whole. The letter agreement to which the dissidents point was part of a global compromise between the parties, who had negotiated their settlement only after significant discovery and under the supervision of a magistrate judge. In view of the complexity and fragility of such a compromise, the provision prohibiting the court from modifying the terms of the agreement is understandable as being in the interests of both parties; it is not indicative that class counsel acted in any way at the expense of the class.

In sum, the dissidents complain about particular portions of the overall settlement and claim that they are individually entitled to more. It is the obligation of the district court, however, to evaluate the fairness of the settlement to the class as a whole. We conclude that the district court did not abuse its discretion in approving the consent decree as fair, adequate, and reasonable to the class as a whole.

B. Opting Out

The Department argues that our recent decision in *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997), holding that a court may permit members of a class certified under Rule 23(b)(2) to opt out of the class action and thus retain the right to sue on their own, is invalid after the still more recent decision of the Supreme Court in *Amchem Products, Inc. v. Windsor,* 117 S. Ct. 2231 (1997). Alternatively, the Department contends that under the criteria of *Eubanks* the district court abused its discretion in permitting the dissidents to opt out. We conclude that *Amchem* does not affect our holding in *Eubanks,* but we agree with the Department that under

Eubanks the district court abused its discretion in permitting the dissidents to opt out.

Rule 23(a) establishes four prerequisites for certifying a lawsuit as a class action. They are that

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides for three types of class actions. Subsection (b)(1) allows a class action if separate actions would risk inconsistent adjudications or if individual adjudications would "be dispositive of the interests of the other members not parties . . . or substantially impair or impede their ability to protect their interests." Under subsection (b)(2) a class action may be maintained where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Finally, a subsection (b)(3) class action is appropriate where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The requirements of the predominance and superiority in subsection (b)(3) are, of course, additional to the requirements of subsection (a), which applies to all class

actions. The right to opt out of a subsection (b)(3) class action is expressly provided in Rule 23(c)(2).

In *Amchem* the Supreme Court addressed the procedure for approving a class action settlement. In that case, the parties had simultaneously filed a class action complaint, an answer thereto, and a settlement agreement. The district court certified the class action under Rule 23(b)(3) and approved the settlement. The Third Circuit reversed, holding that the district court should have evaluated whether to certify the class just as it would have done if the action were going to be tried. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624-26 (1996).

The Supreme Court affirmed the judgment of the court of appeals although it clarified that "settlement is relevant to a class certification" in that, if the case is surely going to be settled, then the "district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997). A "settlement-only class certification" does, however, depend upon compliance with all the requirements of Rule 23(a) and (b). The Court made clear that a district court is to adhere closely to the rule:

> [O]f overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce.
>
> * * * *
>
> Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper.

Id. at 2248, 2249.

The Department contends that this court's recent decision in *Eubanks* was effectively overruled by the Supreme

Court's direction in *Amchem* that courts are bound to observe strictly the requirements of Rule 23. *Eubanks* was a Title VII class action brought against the Librarian of Congress and certified under subsection (b)(2). The district court approved the parties' settlement and held that even if there were a right to opt out of a subsection (b)(2) class action, the individual plaintiffs had failed to show that they were entitled to opt out. Upon appeal we held that, although the district court may in certain circumstances permit members of the plaintiff class to opt out of a (b)(2) suit, the court in that case had not abused its discretion in declining to do so. We recognized that Rule 23 does not "address the possible need for opt-out rights in non-(b)(3) actions," but we thought the Rule "sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions" in certain circumstances. *Eubanks*, 110 F.3d at 93, 94. We based that ruling upon Rule 23(d)(5), which specifically authorizes the court to make "appropriate orders" to govern "procedural matters" in a class action; subsection (d)(5) is broad enough, we held, to permit the district court to provide for opt-outs when appropriate in (b)(1) and (b)(2) class actions. *See id.* at 96; *see also* Fed. R. Civ. P. 23(d) advisory committee's note (1966) (stating that subsection (d) "is concerned with the fair and efficient conduct of the action").

We went on to say that the district court may, when necessary to the fair and efficient conduct of the litigation, exercise its discretion to allow opt-outs in at least two ways. First, if the court find that "the assumption of cohesiveness" underlying certification of a (b)(2) class is inapplicable to the individual class members' claims for monetary damages, then it may certify a hybrid class action under subsections (b)(2) and (b)(3)—the latter of which contemplates individual damages determinations. *Eubanks*, 110 F.3d at 96. Second, if the court determines that particular plaintiffs' claims are "unique or sufficiently

distinct from the claims of the class as a whole," as, for example, where a member of the plaintiff class had filed his own civil action before the class action was filed, *see, e.g., County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304-05 (2d Cir. 1990), then it may permit opt-outs "on a selective basis." *Eubanks*, 110 F.3d at 96.

Nothing in the interpretation of Rule 23 we advanced in *Eubanks* is inconsistent with the Supreme Court's subsequent decision in *Amchem*. The district court's error in *Amchem* had been in substituting the fairness inquiry of Rule 23(e) for the certification requirements of Rule 23(a) and (b). In *Eubanks* we did not omit or even relax any requirement of Rule 23; rather, we held only that in certain limited circustances the district court has discretion under subsection (d)(5) to permit opt-outs, notwithstanding the absence of a specific authorization in subsection (b)(2).

In the alternative the Department argues that the district court abused its discretion by permitting opt-outs because it did not follow either of the options for doing so outlined in *Eubanks*. When the district court issued the decision now before us, *Eubanks* had not yet been decided. Relying instead upon *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the district court asserted that allowing opt-outs is appropriate "when the monetary relief stage . . . is functionally more similar to a (b)(3) class than to a (b)(2) class." 169 F.R.D. at 244. The court was "impressed with the vehemence with which some members of the class have opposed the settlement" and noted its "concern" that "in the absence of allowing for 'opting out' some searing individual injury might be greatly under compensated." *Id.* at 245.

We agree that the district court abused its discretion when it allowed class members to opt out of the settlement in this case. The district court did not pursue either of the two options we later approved in *Eubanks*, nor did it

adduce any other tenable ground upon which opting out might be permitted. Indeed, the dissident plaintiffs do not argue that their case fits within either of the two circumstances instanced in *Eubanks,* nor do they suggest any alternative basis upon which we can uphold the decision of the district court.

First, the district court clearly did not certify a hybrid class action based upon a finding that "the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages." *Eubanks,* 110 F.3d at 96. Class counsel repeatedly requested certification pursuant to (b)(2), the consent decree stated that the parties agreed to certification pursuant to (b)(2), and the court ultimately certified the class pursuant to (b)(2). Although the district court in allowing opt-outs did refer to the distinction between a (b)(2) and a (b)(3) class action, the court did not purport to hold, and did not make findings sufficient to support the conclusion, that a hybrid class certification was appropriate: The court found neither that the assumption of cohesiveness underlying a (b)(2) class certification was unjustified with respect to plaintiffs' individual claims for monetary damages, nor that the monetary or other individual claims were appropriate for certification under (b)(3). Nor did the district court address the predominance and superiority requirements for certification under (b)(3). To the contrary, the court made all the factual findings necessary to show that a hybrid class was not appropriate. The court determined that the plaintiffs sought "extensive injunctive and systemic relief in addition to monetary damages," 169 F.R.D. at 239, and found that the plaintiffs' "predominantly equitable claims . . . arose from a system of personnel actions that have been uniformly imposed on all class members," *id.* at 238.

We recognized in *Eubanks* that whenever individual plaintiffs in a subsection (b)(2) class have claims for

different amounts of damages, their interests may begin to diverge. 110 F.3d at 95. As noted above, however, before hybrid certification is appropriate there must be some reason to believe that the assumption of cohesiveness underlying a subsection (b)(2) class action does not apply to the individual claims for monetary damages; for example, the amounts claimed by various class members may be so disparate as to create a conflict of interest within the class. Here the district court did not find that the assumption of cohesiveness had broken down; nor do the dissident plaintiffs so argue before this court.

Second, the district court did not find that the claims of the individual dissidents are so atypical of the claims of the class as to justify permitting them to opt out of the class. The court stated that there might be some class member(s) with a "searing individual injury" who would be "under compensated" if limited to the relief provided in the consent decree. The court did not determine, however, that there are in fact such persons in the class, let alone that the dissidents are among them. The dissidents do not even argue that they have suffered an unusually grave degree of injury; rather, they argue merely that they stand to be undercompensated for their injuries. As we made clear in *Eubanks*, however, that is not a sufficient justification for permitting members of the class to opt out:

> That . . . appellants received less under the settlement agreement than they might have expected to receive had they prevailed in individual lawsuits cannot alone justify an opt-out, as no party can reasonably expect to receive in a settlement precisely what it would receive if it prevailed on the merits.

Id. at 98. Moreover, this argument was more properly directed to the issue of fairness, *id.* at 98-99, and as such it was rejected both by the district court in the fairness hearing and by this court (in Part II.A, above). Nor are

the dissidents' claims different in kind from those of other class members: In certifying the class the court specifically found that the claims of the named plaintiffs, including eight of the nine cross-appellants, were "typical" of the claims of the class as a whole. 169 F.R.D. at 238.

Third, although the district court could properly rely upon *Holmes* before we issued *Eubanks*, it erred in its application of that case and thereby abused its discretion. *See Koon v. United States*, 116 S. Ct. 2035, 2047 (1996) ("A district court by definition abuses its discretion when it makes an error of law"). In *Holmes* the court held that "[t]he presence in the lawsuit of a significant number of atypical claims not common to the class" required the district court to permit opt-outs. 706 F.2d at 1155. The court also suggested that the assumption of cohesiveness in Rule 23(b)(2) claims for injunctive relief may break down when there are individual claims for disparate amounts of monetary damages and that in such cases opt-outs may be required. *Id.* at 1159-60. As we have pointed out, however, here the district court did not find (and the dissidents do not contend) that the dissidents' claims are atypical or that the assumption of class cohesiveness has broken down.

The dissidents argue, at least implicitly, that they should be permitted to opt out because several of them had individual discrimination complaints pending against the Department. In *Eubanks*, however, we rejected the contention that a pending administrative complaint—as opposed to a lawsuit filed in court—is sufficient to support a class member's preference to opt out of a class action. *See* 110 F.3d at 97. One may not, by first filing an administrative charge and then affirmatively joining a class action as a named plaintiff or an intervenor, obtain the option to see whether the result in the class suit is satisfactory and, if not, then to take up the administrative charge again.

The dissidents also argue, as they emphasized at oral argument, that they must be permitted to opt out because they object to the settlement of their individual claims (as opposed to the class claims). This is not the law; otherwise members of the plaintiff class would have to be allowed to opt out whenever there are individual claims for monetary damages in addition to class claims for injunctive relief. *Eubanks* itself involved claims for injunctive as well as monetary relief, however, and we upheld the district court's decision not to permit opt-outs. Insofar as the dissidents mean to suggest that their individual claims for monetary damages are somehow unique or atypical, as noted above they give us no reason to accept that conclusion.

We hold, therefore, that the district court abused its discretion in permitting the dissident class members to opt out of this class action; the district court made no findings that would support opting out under *Eubanks*. Nor is it necessary to remand the case for the district court to make further findings in light of *Eubanks*; the Department argued in its brief that a remand was not necessary, and the dissidents did not seek a remand to develop the record further in the event we determined that *Eubanks* was not satisfied. Moreover, the dissidents do not allege any alternative basis that, if proved, would enable the district court upon remand again to permit them to opt out.

III. Conclusion

For the reasons stated above, we hold that the district court did not abuse its discretion in approving the fairness of the consent decree. We also conclude that *Amchem* does not undermine this court's holding in *Eubanks*, and that the district court abused its discretion in permitting some members of the class to opt out of the settlement of this case. Accordingly, we uphold the district court's approval of the consent decree and direct that it be made binding upon all members of the class.

So ordered.

[Filed Nov. 7, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2850 (SS)

WALTER J. THOMAS, *et al.*,
Plaintiffs,

v.

WARREN CHRISTOPHER,
Secretary of State,
Defendant.

MEMORANDUM OPINION

This matter comes before the Court for consideration of a Consent Decree entered into by the parties. Plaintiffs' case was originally brought in October of 1986, so it has taken ten years to reach this proposed settlement. The Court attributes this delay to the complexity of the action and the settlement discussions, as well as to the untimely death of the judge to whom this case was originally assigned.

The Consent Decree seeks to resolve all claims that were or could have been brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 *et seq.*, by any African-Americans who were "Foreign Service Generalist Officers" or "Foreign Service Generalist Officer" career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The Court held preliminary fairness hearings on the proposed Consent Decree on March 18, 1996 and March 21, 1996. The Court held additional hearings on July 15,

1996, July 22, 1996, July 23, 1996 and September 19, 1996. During those hearings, the Court heard sworn testimony from members of the putative class who both supported and opposed the consent decree. The Court also heard argument on various matters related to the Consent Decree by counsel for the parties.

Members of the Plaintiff class testifying at those hearings have identified several issues that were of concern to the Court in its evaluation of the proposed Consent Decree. The Court has corresponded with the Secretary of State in an effort to address some of those concerns, and the correspondence is a part of the record. Several of these issues have subsequently been addressed by the Department of State and the Court hopes that several other concerns will yet be addressed by the Department. One issue, that of possible "opting out" of the class of present and former FSOs by those who desire to do so, will be resolved by the Court's decision here.

The Court has reviewed the parties' Proposed Joint Findings of Fact and Conclusions of Law and adopts them as its own with certain minor modifications. The Court's Findings of Fact and Conclusions of Law follow.

FINDINGS OF FACT

Background

In June 1984, Walter J. Thomas, an African-American former Foreign Service Officer ("FSO"), filed an administrative EEO class complaint on behalf of himself and other African-American FSOs, alleging discrimination regarding post and duty assignments, performance appraisals, promotions, censuring, and selection out. In May 1986, Bernard Johns, who is also an African-American former FSO, filed an individual administrative complaint alleging racial discrimination for failure to promote him from grade FO-02 to grade FO-01 and for not receiving an assignment for which he had bid.

Following denial of Mr. Thomas' class complaint by the agency, on October 17, 1986, Walter J. Thomas and Bernard Johns filed their original complaint in this action. The complaint alleged that the Department of State engaged in discriminatory employment practices and retaliatory behavior in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Specifically, the complaint asserted that: (1) the State Department discriminated against black FSOs in assignments, performance appraisals, promotions, tenure, and selection out and (2) that the Department had retaliated against black FSOs for objecting to these unlawful employment practices.

The State Department denied each of Plaintiffs' allegations, contending that: (1) the Department had complied with the letter and spirit of Title VII, and (2) the Plaintiffs did not satisfy the requirements for class certification. Plaintiffs filed their first motion to certify the lawsuit as a class action on January 15, 1987, prior to taking any discovery. They sought certification of a class of all black Foreign Service Officers and career candidates employed by the Department of State at any time after January 20, 1984. Plaintiffs' motion for class certification was denied by Judge Revercomb on July 20, 1987.

On April 28, 1988, Judge Revercomb denied reconsideration of the motion to certify a class action, but granted Plaintiffs' motion to file an amended complaint thereby allowing 30 additional individuals to intervene in order to assert claims of discriminatory employment practices and retaliatory behavior against the Department similar to those asserted by Plaintiffs Thomas and Johns. Following several status conferences, the Court indicated it would consider a renewed motion to certify the class.

Between 1988 and 1994, class counsel obtained in discovery more than 60,000 documents, and hundreds of answers to interrogatories, and they took more than 60 hours of depositions of State Department witnesses regard-

ing the employment practices at issue. In addition, class counsel retained Economic Research Services, Inc. ("ERS"), a Tallahassee, Florida, based economic consulting firm which has considerable experience in employment discrimination cases, to perform statistical and other studies on a "stipulated" computerized database of information provided by the State Department in discovery. This database consists of 93 separate computer tapes and over 1000 pages of explanatory memoranda, printouts, and other documents. Working at class counsel's direction from 1988 through 1995, ERS performed numerous alternative analyses of more than one million individual personnel transactions recorded on the database occurring from 1981 through 1994, pertaining to over 6000 FSOs of all races. The primary objective of these analyses was to determine whether statistically significant evidence of racial discrimination against African-American FSOs existed in any State Department employment practices covered by the complaint.

The State Department retained Longbranch Research Associates to create the stipulated data base and to analyze data with respect to Plaintiffs' allegations in this case.

On December 6, 1991, shortly after the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100, the Plaintiffs moved the Court for leave to file a Second Amended Complaint to demonstrate that their claims against the Department were based on a disparate impact as well as a disparate treatment theory of liability and to request a jury trial, compensatory damages, prejudgment interest, and expert fees, which were not available to Plaintiffs prior to the enactment of the Civil Rights Act of 1991.

By order dated June 2, 1993, the Court established December 1, 1993 as the date for filing a renewed motion for class certification. At the parties' request, on September 21, 1993, the Court suspended discovery and the previously established litigation schedule in order to per-

mit the parties to pursue settlement negotiations. After the deadline for completing those negotiations was twice extended, and in the absence of an imminent settlement, on February 14, 1994, the Court directed counsel for the Plaintiffs to file their renewed motion to certify a class by June 15, 1994.

On June 2, 1994, Plaintiffs withdrew their Second Amended Complaint, on which the Court had not yet ruled, and moved the Court for leave to file a Third Amended Complaint which renewed the claims in the Second Amended Complaint, designated four additional class representatives, and updated certain factual representations. On June 8, 1994, the Court granted Plaintiffs' motion.

Plaintiffs filed their Motion for Class Certification on June 15, 1994, and the State Department filed its opposition to Plaintiffs' motion on September 14, 1994. Both parties supported their filings with detailed affidavits from their statistical experts. However, as a result of the progress reported by the parties in settlement discussions which continued, at the Court's request, under the supervision of Magistrate Judge Alan Kay, the class certification hearing was scheduled and postponed several times. During negotiations, the parties met with Magistrate Judge Kay on more than 15 occasions.

In February 1995, counsel for the class and the Department reached an agreement in principle to settle the case. Various Plaintiffs opposed some of the elements of this agreement. Negotiations between the parties continued in order to finalize the details. On January 31, 1996, counsel for the plaintiff class agreed to recommend a settlement to the approximately 360 class members. The terms of the settlement are embodied in a Consent Decree, which was signed by counsel for the parties on January 31, 1996, and then submitted to the Court for its approval.

To determine whether the proposed Consent Decree was fair, reasonable, and adequate, the Court followed the two-step procedure suggested in the *Manual for Complex Litigation* § 30.44, at 241-42 (2d ed. 1985). First, the Court held a Preliminary Hearing on March 20, 1996. This was: (1) to determine whether the proposed agreement was within the range of an acceptable settlement justifying final approval and, if so, (2) to arrange for providing notice to the members of the class and affording them a hearing to determine whether final court approval should be granted. At the Preliminary Hearing, the Court heard extensive presentations from counsel for the parties, counsel for individual class members, and, separately, from 13 class members. The Court granted preliminary approval on March 22, 1996.

The second stage of the settlement approval process involved sending the proposed Consent Decree to every known member of the class together with a court-approved notice informing all class members of their right to file comments, objections, and any statement of interest in opting out of the settlement. Class counsel, counsel for the defendant, and counsel for some of the individual Plaintiffs all reviewed the notice prior to its approval by the Court. This notice also informed all class members of their opportunity to appear and be heard at a Fairness Hearing on July 15, 1996. The Court's March 22, 1996 order and the Fairness Hearing Notice stated that class members' responses to the Notice and comments on the Consent Decree must be received by the Court on or before June 11, 1996.

With respect to the Fairness Hearing on July 15, 1996, the court-approved notice was sent during the first week of April 1996 to all known class members as follows:

> (a) To class members in the Foreign Service assigned to State Department positions in the United States and to class members separated from the For-

eign Service but employed by the State Department in a Civil Service or contractor position, the required documents were delivered by State Department internal mail. The documents delivered through the State Department's internal mail included an "Acknowledgement of Receipt" form and a pre-addressed envelope to use to return the confirmation form.

(b) To class members in the Foreign Service assigned to non-State Department positions in the United States and to class members who are separated from the Foreign Service but who do not work for the State Department in another capacity and whose last known address is in the United States, delivery was via U.S. registered or certified mail, return receipt requested.

(c) To class members in the Foreign Service assigned to U.S. Government facilities overseas, delivery was via U.S. Department of State pouch.

Of 359 known class members who were sent notice, approximately 30 notices were either returned or delivery was not acknowledged. No class member indicated any deficiencies in nature or timeliness of the notice provided to them. Nor did any class members complain of lack of opportunity to present to the Court their views in opposition to or in favor of the settlement.

In addition, in accordance with Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2, all FSOs and career candidates employed by the State Department as of March 22, 1996, the date of Preliminary Approval, were provided notice that one or more of the terms of the settlement might adversely affect their interests and legal rights and to advise them of the opportunity to file objections or comments and to appear at the July 15, 1996 Fairness Hearing. Accordingly, the Court finds that the conditons of Section 108 of the Civil Rights Act of 1991

were satisfied and that the terms of the Consent Decree may not be challenged hereafter by anyone who either had actual notice of the settlement or whose interests were adequately represented by another person who presented objections at the Fairness Hearing.

The notice of the July 15, 1996 hearing was reasonably calculated, under all of the circumstances, to apprise interested parties of the proposed settlement and afford them an opportunity to comment on the terms of the Consent Decree. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 64, 70-71 (2d Cir. 1982) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)), *cert. denied,* 464 U.S. 818; *see also, Grunin v. International House of Pancakes,* 513 F.2d 114, 120 (8th Cir. 1975) ("the mechanics of the notice process are left to the discretion of the court subject to the broad 'reasonableness' standards imposed by due process"), *cert. denied,* 423 U.S. 864 (1983). The Consent Decree and Fairness Hearing Notice delivered to class memmbers and other individuals reasonably conveyed the information that was required to be communicated and afforded a reasonable time for those interested to comment on the proposed settlement. The objectors had adequate and reasonable opportunity to formulate and present meaningful objections to the proposed settlement. In all, nearly 11 weeks were available for the preparation and filing of objections between Preliminary Approval of the proposed settlement on March 22, 1996, and the deadline for filing objections on June 11, 1996.

Based on the foregoing, and all other evidence before the Court, the Court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the proposed class certification and terms of the settlement was given to class members.

Relief to the Plaintiff Class in the Settlement

The Court finds that the settlement provides fair, reasonable and adequate relief to the class, as follows::

1. *Prospective and Injunctive Relief*

The Consent Decree provides that an injunction will be entered, effective for four years from the date of this Court's Preliminary Approval, prohibiting the State Department from discriminating on the basis of race in promotions, awards, censuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, or training. The injunction also bars the State Department from retaliating against any class member for participation in equal employment opportunity activities.

The Consent Decree requires the following significant internal State Department reforms:

> *Council for Equality.* The Consent Decree provides for a senior level Council for Equality in the Workplace to monitor and advance equal employment opportunities in the Department. The Council will consist of eight high-ranking members of the Department selected by the Secretary of State, including at least one African-American, and will be chaired by the Under Secretary of State for Management. In response to a suggestion from the Court, the Secretary of State agreed to appoint one additional Council member from outside the State Department and to meet personally on an annual basis with this Council. The Council will review annually data on the racial profile of post and duty assignments and honor award recipients within each Bureau and across the Department, including the profiles of Ambassadorial positions, Assistant Secretary and Deputy Assistant Secretary positions, and all other "program direction" positions. Following its review of the data, reports

from Assistant Secretaries and Bureau heads, the Council will meet with Assistant Secretaries and bureau heads to make policy recommendations concerning employment practcies that advance the goals of equal employment opportunity in the Foreign Service. Class counsel may submit reports to the Council regarding barriers to advancement or imbalances in opportunity in the Foreign Service on the basis of race which they or members of the class believe exist at the State Department. The Council will also provide class counsel with copies of its annual reports.

Job Analysis/EER Revision. The State Department, with the assistance of an expert consultant, will hire a contractor to conduct a comprehensive job analysis of FSO job duties, including an assessment of the knowledge, skills and abilities needed by FSOs. The expert consultant will then recommend whether the current Employee Evaluation Report ("EER") form used to evaluate FSOs should be modified to ensure that the potential of tenured FSOs is assessed on the basis of the knowledge, skills, and abilities necessary to perform successfully at the next higher grade and that racial bias is minimized in that assessment. Class counsel will play an active role, particularly in such areas as selecting the expert consultant, reviewing the draft Statement of Work for the contract solicitation, participating on a committee to advise the contractor, and reviewing the results of the job analysis and the underlying data. Performance appraisals determine who is promoted and who is selected out. These steps are designed to assure that the Foreign Service evaluation system relies on objective criteria to predict future success and to address the other concerns that motivated the class action.

EO/Diversity Awareness Training. The State Department will revise and expand its EEO/Diversity

Awareness training and require priority participation by all supervisors of FSOs and, eventually, by all FSOs. The revised training courses draw on successful programs used by other agencies and by private industry. They teach management methods that foster equality in the workplace and avoid discrimination in evaluations, assignments, and awards. The value of this provision lies in its potential to continue to change attitudes and behavior in the Department long after the Decree itself has expired. Plaintiffs' counsel already have reviewed a draft agenda for each course, including a description of all activities and the goal of each activity.

Superior Honor Awards. The Director General appointed a working group to review individual Superior Honor Award Nominations to determine whether these awards reflect the racial composition of the bureaus in the Department and, if not, to examine the circumstances under which the imbalances occurred, and to make recommendations to redress any particular or systemic problems that are identified. The purpose is to prevent future racial imbalance in the selection process, unless the working group finds legitimate (i.e., performance-based) reasons for the imbalance. Class counsel, after receipt of the raw data provided to the working group, may submit their own recommendations to the working group. Class counsel will also be offered the opportunity to review the report of the working group and to make such suggestions as counsel believe are warranted.

Certification of Selection Out Process. When a Performance Standards Board ("PSB") is considering an African-American FSO generalist for possible selection out, the Department will make its best efforts to include at least one African-American member on the Board. The Department will notify class counsel

of its efforts in each instance in which an African-American member is not included on such a PSB. In addition, the Department will certify that the PSB received a briefing on EEO and made its decision on the factors identified in applicable precepts.

Electronic Database. The Department will establish an Integrated Personnel Management System ("IPMS"). The IPMS will permit the Department to collect and analyze data pertaining to personnel functions including but not limited to promotions, awards, censuring, and terminations by race.

Affirmative Action Plan. The Department will maintain and revise the current EEOC-approved affirmative action plan applicable to members of the Foreign Service.

Monitoring. The Consent Decree provides a mechanism for class counsel to monitor the Department's compliance with the consent decree. For a total of four years, commencing on the date the Court gave Preliminary Approval to the Consent Decree, the Department shall report the following information, covering the preceding twelve months, to class counsel: total FSO generalist population statistics; program direction, stretch, and training assignments; tenure decisions; honor awards; diversity training; promotions; and selections out. The Consent Decree also provides a mechanism for the parties to resolve disputes concerning application of or compliance with the consent decree. All reports will be filed with the Court, to enable it, as appropriate, to engage in an independent assessment of the implementation of the Consent Decree.

At the Fairness Hearing, Plaintiffs' expert on prospective relief gave his opinion that, after participating in extensive discussions with the State Department and consultations with class members, he had come to believe that the Consent Decree embodies significant reform meas-

ures designed to eliminate the barriers to advancement by class members. He also gave his expert opinion that the monitoring and accountability systems in the Decree were "state-of-the art."

2. *Retroactive Relief*

Sixteen class members will receive immediate promotions within the mid-level grades, and one class member will be promoted in the Senior Foreign Service from grade FE-OC to FE-MC. To maximize the remedial long-term effect on discrimination in the Department's personnel system, the seventeen promotions will be awarded to class members currently active in the Foreign Service who have been at their present grade for the longest period of time and who were recommended but not reached for promotion from that grade.

The Consent Decree provides for the selection of an impartial review panel (the "Review Panel") to make reinstatement decisions and decisions concerning termination damages. The panel consists of three members, one chosen by the 30 original named Plaintiffs, one chosen by class counsel, and the third chosen by the first two members. The Panel member chosen by the Plaintiffs through a nomination and voting process is a social anthropologist, an educator, and a former country director in the Peace Corps. Class counsel chose an attorney who served as counsel to the Deputy Attorney General, exercising oversight responsibility for issues affecting civil and political rights, and who previously worked in the Civil Rights Division of the Justice Department. Those two Panel members selected as the third panelist a former FSO who served as Ambassador to Malawi and Uganda and as Consul General in Capetown. Following their selection, and subsequent to an interview with the Court, Panel members received court appointments. Their work and decisions, cloaked in quasi-judicial immunity, were discharged in exemplary fashion.

The Panel completed its work successfully and, on July 11, 1996, submitted to the Court its Decisions and Recommendations.

The Department will provide reinstatement with new five year limited term appointments as Junior Officer Candidates to four class members who did not obtain tenure while they served as Foreign Service Officer career candidates. The four reinstatements were offered to individuals selected by the Review Panel from a negotiated list of eligible class members according to the criteria set forth in the Consent Decree. The factors for selection included: (1) evidence that the class member was recommended for tenure by a Foreign Service Commissioning and Tenure Board but did not receive career status for other reasons, e.g. failure to clear language probation; (2) evidence of the percentage of recommendations for tenure based on the number of performance evaluations that are officially part of the class member's performance file; and, (3) evidence of the time the class member spent in the Foreign Service before being separated. A list of class members eligible for reinstatement is contained in a Confidential Exhibit to the Consent Decree.

The agreement provides for the class to receive a total award of $3.8 million in satisfaction of all class claims for monetary relief, $125,000 will be distributed to the 30 named Plaintiffs for their estates) in recognition of their efforts to resolve the class action successfully, including $40,000 to Walter J. Thomas, the lead plaintiff,[1] and $85,000 pro rata among the 29 other named Plaintiffs.

$2.9 million will be distributed to class members who did not receive promotions or whose promotions were delayed. That money will be distributed according to a formula based on the amount of promotion delay expe-

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[1] Mr. Thomas has elected to opt out of the settlement, so he will not receive this or any other sum from the settlement.

rienced by each class member beyond the median time calculated by Plaintiffs' expert for white male FSOs.

A total of $775,000 has been divided into two pools for distribution to class members who may have been "selected out," i.e., terminated, for race-related reasons. Pool A (at least $200,000) will be allocated on a formula basis to 29 class members who were terminated from the Foreign Service on the grounds of "unsatisfactory performance" or who were considered constructively discharged according to the impartial Review Panel established by the terms of the Consent Decree and approved by the Court. Pool B ($575,000) will be distributed to four members of Pool A based on a number of specified criteria applied by the Review Panel as described in Appendix F of the Consent Decree. Pool B is available to a maximum of four class members in Pool A because that is a reasonable estimate of the number of excess terminations shown by statistical analysis. The monetary award to any individual from Pool B is capped at $250,000.

During the first week in June 1996, class members were notified of the preliminary calculations of the amount of their individual "promotion damages" awards. Under the terms of the Consent Decree, 265 class members would receive an average award for promotion damages of $10,900. Class members who did not qualify for this type of award include those who were promoted at or faster than white males, the comparison group used for damages calculations or those who were excluded under the damage distribution provision of the Consent Decree (Exhibit F) because they achieved the personal rank of Career Minister or Career Ambassador, or because they served as Chief of Mission regardless of personal rank. Seventeen class members who upon final approval of the Consent Decree will receive immediate promotions to the next highest grade were also notified of their promotions in early June 1996.

The Review Panel also reviewed the applications of eight class members who applied for reinstatement and, as

provided for in the Consent Decree, selected four. The Panel also analyzed the applications of thirty class members who applied for "termination damages" awards from "Pool A" and "Pool B." The Panel selected twenty-nine class members, who will receive an average Pool A award of $16,400. The Panel then selected four class members for Pool B and awarded them an average of $75,000. The Pool B awards ranged from $40,000 to $120,000. All Pool A and Pool B recipients were notified of their awards in early June.

Ninety-one of 359 class members, as well as two non-class members, filed comments regarding the Consent Decree. Thirty-four class members submitted comments in support of final approval of the Consent Decree and fifty-five class members objected to various provisions. Class members filed objections claiming inadequate individual and/or class-wide relief, inadequate injunctive and/or prospective relief, and inadequate monitoring provisions. Several class members did not identify their objections. Two non-class members filed objections asserting that the relief provided by the Consent Decree constitutes reverse discrimination.

At the July 15, 1996 Fairness Hearing, the Court heard from all class members who appeared and chose to testify. Of the 14 who spoke, 3 testified in favor of the settlement, 8 were opposed, and 3 were ambivalent or neutral. Two groups of objecting Plaintiffs retained separate counsel to present their objections. The Fairness Hearing continued on July 22 and on July 23 to permit counsel to respond to the Court's questions about the Consent Decree. At the close of the July 23 hearing, the Court directed the State Department to send a second notice to the twenty-seven class members who had indicated through testimony at the Fairness Hearing or in written comments their preliminary interest in "opting out." The notice required those twenty-seven to file a motion to opt out, to explain the

reasons for their request, and to provide the legal authority which supported their request. The notice required those class members to respond by September 3, 1996.

Nineteen class members filed motions with the Court seeking to opt out of the settlement (three class members subsequently withdrew their motions and have been reinstated in the settlement). The Consent Decree itself does not expressly permit or prohibit opting out. The State Department maintains that the Court does not have the legal authority to permit "opt outs" under the circumstances of this case because the class sought certification under Rule 23(b)(2). Counsel for the 16 class members who seek permission to opt out contended that the Court has the discretion to permit opt outs. The Court addresses this issue below.

3. *Legal Fees*

The settlement provides for the distribution of $2.1 million in legal fees and expenses as set forth in Exhibit K to the Consent Decree. Defendant's counsel stated at the July 15, 1996 Fairness Hearing that the sum of $2.1 million was offered separately from the $3.8 million offer to settle the monetary claims of the class. The sum of $2.1 million includes reimbursement for expenses in excess of $650,000 actually incurred by the firms listed in Exhibit K of the Consent Decree. The balance of approximately $1.4 million represents compensation for the time spent by counsel and persons working at their direction.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs, the law firms of Akin, Gump, Strauss, Hauer & Feld, L.L.P. and Walter & Haverfield devoted more than 30,000 hours to litigating and negotiating the settlement of this case. This reimbursement is considerably less than the rate provided under the guidelines established by *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), which applies to the determination

of legal fees in Title VII cases in the District of Columbia circuit.

Additional Findings

In addition to those findings of fact included above, the Court further finds as follows:

—Upon consideration of the number and extent of negotiating sessions, the close involvement of Magistrate Judge Alan Kay, and the compromises reached on the specific settlement terms, the Court finds that the Consent Decree was the product of arm's length bargaining and that there was no evidence of collusion;

—Based upon the report of the Review Panel and testimony from the Review Panel at the Fairness Hearing, the Court finds that the Review Panel reached its decisions according to the guidelines and procedures set forth in the Consent Decree and that its decisions were fair and reasonable;

—The reform measures undertaken by the State Department together with the four year injunction against discrimination and the provisions enabling class counsel to monitor the State Department's progress in implementing the terms of the Consent Decree are fair, adequate and reasonable prospective relief measures; and

—The award of $2.1 million in legal fees and expenses is reasonable and justified in light of the duration of this case, the relief obtained for the class, and the fact that the amount of legal fees and expenses represents a compromise that is appropriate under the facts and circumstances of this settlement.

CONCLUSIONS OF LAW

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, prohibits discrimination in

employment on the basis of race. Specifically, Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ." 42 U.S.C. § 2000e-2(a)(1).

Title VII also makes it unlawful for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ." 42 U.S.C. § 2000e-2(a)(2).

Certification Of The Settlement Class

The parties have agreed that the Court, by approving the Consent Decree, shall be certifying a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The practice of certifying a settlement class simultaneously with the approval of the pre-certification settlement is widely accepted. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157, (S.D. Ohio 1992) ("tentative settlement can precede or be concurrent with class certification" (quoting *Clark Equipment Co. v. Allied Indus. Workers of America*, 803 F.2d 878, 881 (6th Cir. 1986))); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *see also* Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§ 11.22, 11.27 (3d ed. 1992).

By granting the requested certification, the parties will be able to avoid protracted litigation and effectuate a

settlement that will provide immediate and substantal benefits to the members of the class. Moreover, given the lengthy, active, arms length negotiations between the parties and the fairness of the settlement, there is no danger of abuse of the settlement class device in this case.

Federal Rule of Civil Procedure 23(a) explicitly sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the class representatives are typical of the claims of the class; and, (4) the class representatives will fairly and adequately protect the interests of the class. In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the three subsections of Rule 23(b).

The Court's concludes that the class does meet the requirements of Rule 23(a) as follows:

Numerosity (Rule 23(a)(1)). This provision focuses on the practicality of joining all prospective class members in a single lawsuit. Where joinder is impractical, a suit may be maintained as a class action in the interest of judicial economy and to ensure access to the judicial system. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Although Rule 23 requires no minimum number of class members, numerosity is generally satisfied by a proposed class of at least 40 members. *Committee of Blind Vendors v. District of Columbia*, 695 F. Supp. 1234, 1242 (D.D.C. 1988) (63 class members satisfy numerosity requirement); *Sperling v. Donovan*, 104 F.R.D. 4, 7 (D.D.C. 1984) (46 class members).

In this case, the known class consists of approximately 360 members, which includes more than 260 individuals actively employed by the State Department throughout the world. The Court concludes that the sheer number and wide dispersion of members of the proposed class renders joinder practically impossible.

Commonality (Rule 23(a)(2)). The requirement that a class action present common questions of law and fact is intended to ensure that every member of the proposed class has been subject to the same discriminatory employment practices. *General Tel. Co. v. Falcon,* 457 U.S. 147, 159 n.15 (1982). Commonality requires proof that the treatment challenged as discriminatory was a "standard operating procedure—the regular rather than the unusual practice . . . statistical evidence, for example, may suffice if the disparities in treatment are significant." *Wagner v. Taylor,* 836 F.2d 578, 592 (D.C. Cir. 1987). However, it is not necessary that each class member have suffered from the policy in precisely the same manner, only that the alleged discrimination stem from that same general policy. *See, e.g., Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590, 597-98 (2d Cir. 1986).

To demonstrate that the claims of each class member involve common questions of law and fact, the plaintiff class introduced evidence to support their contention that statistically significant disparities existed in the rates at which white officers and black officers are tenured, terminated, assigned, and promoted. The Plaintiffs also asserted that the existence of common questions of law and fact was established because the State Department's key personnel procedures are centrally administered, highly subjective, and applicable to all class members throughout their careers.

To support their assertion, Plaintiffs argue that a successful Foreign Service career depends on performance evaluations, which represent a supervisor's subjective assessment of performance. Plaintiffs assert that the evaluation procedures which applied during time periods relevant to this case did not provide objective standards to ensure that impermissible considerations, such as race, did not play a role in performance appraisals. Further, Plaintiffs argue that because promotions depend entirely on the

comparative rankings determined by selection boards, one officer might have been promoted over another whose performance was indistinguishable from the first officer's but identified as merely "outstanding" rather than "superlative" by that rating officer. Plaintiffs claim that the existence of common questions of law and fact was further demonstrated by the participation of 30 individuals as Plaintiffs in this lawsuits. The affidavits each filed with the First and Third Amended Complaints attest to how the State Department's policies affected his or her career and illustrated that the claims asserted are common to the class.

The State Department presented analyses disputing the existence of statistically significant disparities based on race and opposed Plaintiffs' contention of the existence of common questions of law and fact by noting that the Department's personnel system is highly decentralized.

Upon consideraton of the entire record in this case, however, the Court finds that this case presents common questions of law and fact and satisfies the requirement of Rule 23(a)(2).

Typicality (Rule 23(a)(3)). The typicality requirement is to ensure that the class representatives have suffered injuries in the same general fashion as absent class members. *Wagner v. Taylor,* 836 F.2d 578, 591 (D.C. Cir. 1987). Because the elements of commonality and typicality tend to merge, *Falcon,* 457 U.S. at 157 n.13, where Plaintiffs establish commonality by proving class-wide harm caused by a subjective, centrally administered personnel system, typicality is satisfied by the same showing. *Id.* at 159 n.15. As with the requirement of commonality, the facts and claims of each class member do not have to be identical to support a finding of typicality. *Wagner,* 836 F.2d at 591.

In this case, to demonstrate that the class representatives' claims are typical of the class claims, the Plaintiffs

assert that class representatives Thomas, Williams, Fields and Marquis all experienced discrimination in assignments, having been assigned to less desirable posts than other career-enhancing positions for which they qualified and bid. Plaintiffs Latimer, Marquis, Williams, and Fields claimed discrimination in tenuring, having experienced irregularities or delays in the tenuring process or having been terminated from the State Department for failure to obtain tenure. All of the class representatives claimed promotion discrimination, having been delayed or denied promotions they deserved. Finally, Plaintiffs Thomas, Williams, and Fields claimed they were terminated from the State Department for alleged poor performance or failure to receive tenure as a result of their performance.

The State Department contends that the class representatives did not present claims typical of the class because no single class representative suffered from all of the employment practices being challenged in the case and because the plaintiff intervenors, given the diversity of their individual allegations, did not meet the minimum criteria under the law for the creation of sub-classes.

Upon consideraton of the entire record in this case, however, the Court finds that the experiences of the class representatives are typical of the allegations in the class complaint and satisfy the requirements of Rule 23(a)(3).

Adequacy of Representation (Rule 23(a)(4)). The adequacy of representation requirement is to ensure that the rights of absent class members are represented vigorously by qualified counsel and by the class representatives. *National Assoc. for Mental Health v. California*, 717 F.2d 1451, 1458 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). The Court finds that class counsel have the experience and competence to provide adequate representation to all class members. The Washington Lawyers' Committee has extensive experience including the litigation of more than twenty class actions such as *Kernan v. Holi-*

day Universal, Inc. No. JH-90-971 (D. Md. 1990); *McKenzie v. Kennickel,* No. 73-0974 (D.D.C.) (Parker, J.); *Berger v. Ironworkers Local 201,* No. 75-1743 (D.D.C.) (Penn, J.); and *Cook v. Billington,* No. 82-0400 (D.D.C.) (Johnson, J.). Akin, Gump, Strauss, Hauer & Feld, L.L.P. is an international law firm with extensive experience in complex federal litigation, including individual and class EEO cases. Carl Anderson of Walter & Haverfield is the former legal counsel to the Governor of Ohio and has experience in a variety of civil rights issues.

In the present action, the predominantly equitable claims of the class arose from a system of personnel actions that have been uniformly imposed on all class members. Moreover, all the class representatives share the same commitment to assure that racial discrimination does not occur at the State Department and have vigorously proscuted the claims raised in this lawsuit, even though in the context of settlement some of the class representatives may have differed with class counsel and with the class over the amount and distribution of damages. Ultimately, the adequacy of the named Plaintiffs' representation is determined by the terms of the settlement itself. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§ 11.28, at 11-59 (3d ed. 1992) ("in the settlement context . . . the adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative").

The Court concludes that the settlement was clearly negotiated at arm's length and presents no danger of collusion. The following factors support this finding: (1) the size and complexity of the Consent Decree and the compromises reflected therein; (2) the context in which it was reached, that is, after more than nine years of litigation; (3) the fact that the settlement is the result of more

than 30 months of often difficult negotiations between the parties; (3) the fact that during negotiations class counsel met with class representatives and other class members on more than 125 occasions and held more than 1000 teleconferences regarding various aspects of the settlement; the Court's personal knowledge of the negotiators; and the intervention of Magistrate Judge Kay in the final and other stages of the negotiations. Thus, the Court finds that class counsel and the class representatives fairly and adequately protected the interests of the class.

In addition to meeting the prerequisites of Rule 23(a), the class must be properly categorized under Rule 23(b). In this case, Plaintiffs moved for certification under Rule 23(b)(2), which authorizes class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Advisory Committee Notes to Rule 23 recognize that subdivision (b)(2) was intended for civil rights cases such as this one where "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. The parties also submit that certification under Rule 23(b)(2) is not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. *Probe v. State Teachers Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 71 F.R.D. 666, 671 (S.D.N.Y. 1976).

The relief sought by the class, and secured by the terms of the Consent Decree, includes extensive injunctive and systemic relief in addition to monetary damages. The parties submit that, in cases where monetary relief is

sought, certification under Rule 23(b)(2) is precluded only if the final relief sought relates "exclusively or predominantly to money damages." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. Accordingly, the Court finds that the class in this case meets the requirements for certification under Rule 23(b)(2).

The Consent Decree and the Interests Of The Class

The Court has concluded that the approval of the Consent Decree is in the best interests of the class.

Federal Rule of Civil Procedure 23(e) imposes a duty on the Court to review all class action settlements in order to determine whether approval is warranted. Rule 23(e) provides in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The requirements of Rule 23(e) are to "ensure that class actions are not settled or compromised to the undue detriment of others, normally absent class members who will be affected by the terms of the compromise." *Brooks v. State Bd. of Election,* 848 F. Supp. 1548, 1552 (S.D. Ga. 1994); *Officers for Justice v. Civil Serv. Com'n of San Francisco,* 688 F.2d 615, 624 (9th Cir. 1982) (Rule 23(e) protects "class members, including the named Plaintiffs, whose rights may not have been given due regard by the negotiating parties"), *cert. denied,* 459 U.S. 1217 (1983); *Simer v. Rios,* 661 F.2d 655, 665 (7th Cir. 1981) ("requiring notice to putative class members . . . insures that [their] interests will be protected"), *cert. denied,* 456 U.S. 917 (1982).

In approving a proposed settlement agreement, the district court must determine that the agreement is "not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole is fair, reasonable and adequate to all con-

cerned." *Williams v. Vukovich,* 720 F.2d 909 (6th Cir. 1982); *Leverso v. SouthTrust Bank of Ala.,* 18 F.3d 1527, 1530 (11th Cir. 1994); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1291, (9th Cir.), *cert. denied,* 506 U.S. 943 (1992); *Luevano v. Campbell,* 93 F.R.D. 68, 86-91 (D.D.C. 1981).

The Court concludes that the settlement reached in this case is the product of extensive, non-collusive negotiations between the parties conducted through the most critical stages by Magistrate Judge Kay. There is no evidence of fraud or duress, as demonstrated by a number of factors, including the length and complexity of the Consent Decree, the compromises reflected therein, and the fact that the settlement occurred only after years of extensive discovery.

The Court's determination is guided by a variety of factors including: (1) the strength of Plaintiffs' case on the merits balanced against the amount offered in settlement; (2) the opinion of counsel on the fairness of the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the length, complexity, and expense of further litigation; (5) the reaction of class members to the proposed settlement and their opposition, if any, to the settlement terms. *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.), *cert. denied,* —— U.S. ——, 114 S. Ct. 2707 (1993); *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1323-24 (2d Cir. 1990); *Stoetzner v. United States Steel Corp.,* 897 F.2d 115, 118 (3d Cir. 1990); *Parker v. Anderson,* 667 F.2d 1204, 1209 (5th Cir.), *cert. denied,* 459 U.S. 828 (1982); *League of Martin v. City of Milwaukee,* 588 F. Supp. 1004 (E.D. Wis. 1984).

Although the relative importance of any single factor depends on the circumstances of each case, balancing the strength of the plaintiff's case against the terms of the settlement is generally regarded as the most important.

Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988); *Parker v. Anderson*, 668 F.2d at 1209; *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("[I]f the settlement offer was grossly inadequate . . . it can be inadequate only in light of the strength of the case presented by the Plaintiffs.").

The settlement provides broad prospective relief which the Plaintiffs could otherwise secure only by prevailing at trial on all issues. Under a realistic projection of potential litigation outcomes, it is unlikely that the class, if certified, would prevail on all issues. Thus, a more narrowly tailored injunction would be entered, and it is unlkely that class counsel would be able to monitor the impact of the reform measures on class members on which they did not prevail at trial. Although several prospective reform components in the Consent Decree also have been implemented pursuant to the settlement of the women's class action, *Palmer v. Christopher*, class counsel's ability to monitor those provisions is essential and can only be guaranteed through this settlement. The Court therefore determines that the certainty of prospective relief secured by the settlement, when compared to the uncertain outcome of litigation, is in the best interests of the class.

Prospective relief measures are as follows:

Promotions. The class will receive 17 immediate, new promotions. Plaintiffs' counsel presented arguments during settlement negotiations that demonstrated a maximum shortfall in the promotion of African-Americans in the range of 40-47. That analysis aggregated data across the mid-level grades and for all years covered by the lawsuit and counted as a promotion "event" the failure of a class member to be actually promoted from one grade to the next. Plaintiffs' counsel and experts had no statistically significant evidence of promotion discrimination in the

junior grades or the senior grades of the Foreign Service. In the senior grades there were too few class members to make statistical analysis meaningful.

The State Department disputes Plaintiffs' aggregation analysis and contends that, after controlling for appropriate variables, its maximum exposure was 10 "promotion events." According to the Department's statistical experts, a promotion event was a calendar year and, to the extent a shortfall existed, was properly remedied through monetary damages rather than actual promotion to the next grade. The Department asserts that Plaintiffs' analysis counted the same officer multiple times because promotion boards met annually and often promoted an officer upon subsequent review. Further, the Department contends that the shortfall of 10 applied only from grade 03 to grade 02, the only grade where a statistically significant shortfall even arguably existed.

In settlement, counsel for the parties agreed to 16 actual promotions for mid-level grade class members and one promotion within the Senior Foreign Service from grade OC to grade MC baseed upon analysis of the litigation risk that, if defendant's statistical model was found persuasive and Plainttiffs' model was rejected, Plaintiffs would obtain few, if any, actual promotions.

The Court determines the agreement to promote 17 class members to the next highest grade according to the procedures outlined in the Consent Decree to be fair, adequate, and reasonable.

Terminations/Reinstatements. Four class members who were separated for failure to achieve tenure will be reinstated into the Foreign Service as a result of the settlement. During negotiations, the parties disagreed over the accuracy of portions of the stipulated database pertaining to tenure and terminations of FSOs previously granted tenure. Class counsel argued that all performance based termina-

tions should be aggregated for analytical purposes, including career candidates denied tenure and officers separated for alleged poor performance.

The State Department contends that separate analysis was required for tenure decisions and performance-based terminations of those officers who had previously received tenure. The State Department initially maintained that, after analyzing all post-1984 tenure decisions, there was no statistically significant disparity in the tenure rates of African-American career candidates. The Department reached the same conclusion for the performance-based separation of tenured officers. In addition, the Department asserted that an insufficient number of class members were denied tenure or separated for poor performance to certify a class on either issue, whether separated or combined for analysis. Accordingly, the Department refused to offer any reinstatements.

In light of the litigation risks presented by the parties' conflicting views on the correct data, the proper statistical methodology for analysis, and the likelihood of certifying this issue, the parties agreed to the reinstatement of 4 class members who failed to achieve tenure for limited five year appointments as Junior Officer Candidates, with the opportunity to obtain tenure.

The Court concludes that, because of the litigation risks, the agreement to reinstate 4 class members at the junior level according to the procedures outlined in the Consent Decree is fair, adequate and reasonable. Nonetheless, as the Court has mentioned on several occasions during the course of these deliberations and as it expressed in a letter to the Secretry of State, it would also be fair and appropriate for the Department to establish voluntarily some process for looking at the 15 or so individuals who now seek reinstatement but who were denied it because of the arbitrary limits of the settlement agreement. In the letter, the Court expressed its view as follows: "Because

the settlement limits the number of persons reinstated to four, it was my view that a safety-valve mechanism might be devised to assure that there would be no injustice to any individual because of the numbers limitation set forth in the settlement."

Monetary Relief. The class will receive a total of $3.8 million.

The Supreme Court's decision in *Landgraf v. USI Film Prods.* —— U.S. ——, 114 S. Ct. 1483 (1994), foreclosed retroactive application of certain provisions of the 1981 Civil Rights Act amendments, including the right to a jury trial and compensatory damages, to acts occuring before the effective date of the Act. Relying on *Landgraf*, the government took the position that prejudgment interest would not be available in this case. Accepting this position in consultation with their statistical experts, class counsel developed a projection of defendant's financial exposure on all damages issues in the range of $2.5 to $4 million. That estimate was based on its experts' detailed promotion back pay calculations and analyses of the stipulated database, and it represented counsels' assessment of the most likely outcome of successful litigation.

Relying on analyses performed by its statistical experts, the State Department vigorously disputed Plaintiffs' damage estimates and calculated that its maximum damage exposure ranged from $725,000 to $1.5 mililon.

Evaluation of an appropriate monetary settlement required the parties to assess the litigation risks attached to the class certification, the competing experts' statistical analyses, and a showing as to each challenged employment practice.

If litigation had continued, relief to the class would have been delayed for several years. In the event that a class would be certified on all issues, the parties then would have to complete a trial on the merits, a likely ap-

peal by the losing party, and, then if successful, a follow-up individual "Teamsters hearings" on damages suffered by individual class members. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In the absence of a right to collect prejudgment interest, the Plaintiffs would need to recover a far greater monetary award in order to equal the amount to which the State Department ultimately agreed in settlement. In short, the Plaintiffs had to take into account the present value of money when comparing the State Department's final offer to the amount which could reasonably be recovered at the conclusion of protracted litigation. To justify continuing to litigate for five more years, class counsel projected that Plaintiffs would have to recover at least $5.6 million at that time to equal the present value of the $3.8 million settlement amount accepted by class counsel. The calculation of the time value of the $3.8 million monetary award projected over 3-5 years far exceeded Plaintiffs' most optimistic estimate of the likely monetary recovery on behalf of the class.

In light of those combined considerations, the Court does not dispute the statement that a $3.8 million monetary settlement was at the high end of projected litigation outcomes and represents a fair, adequate, and reasonable monetary award to the class.

As supported by the findings of fact in this case, the Court concludes that the classwide prospective and retroactive settlement terms constitute substantial relief which satisfies virtually all of the class's litigation objectives. Thus, protracted litigation is not likely to yield significant additional relief.

In addition to balancing the likely outcome of litigation against the settlement terms and considering the context in which the settlement was reached, the Court must consider the reaction of the class to the proposed agreement. In this case, 55 out of 359 class members, or 15 percent

of the class, oppose final approval of the Consent Decree. Court approval of a class action settlement does not hinge exclusively on a vote by class members. In fact, under well established case law, a fair, reasonable, and adequate settlement will obtain court approval notwithstanding a significant number of objectors. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *Isby v. Bayh*, 75 F.3d 1911 (7th Cir. 1996) (approval over objections of 13% of 200 member class); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884 (7th Cir. 1985) (approval over objections of 15% of 253 member class), *cert. denied*, 478 U.S. 1004 (1986); *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983) (approval over objections by 23 of 27 named Plaintiffs and 15% of 1,500 member class); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (settlement approved despite objections of holders of 56% of outstanding shares); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977) (approval over objections of counsel claiming to represent almost 50% of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir), *cert. denied*, 419 U.S. 900 (1974 (approval over objections of approximately 20% of 452 member class).

Further, class action settlement agreements do not require the assent of named Plaintiffs as a prerequisite to Court approval. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n. 19 (4th Cir. 1975) ("Appellants do not argue, nor may they under the authorities, that assent of the class Plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable."); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) ("To be sure, the assent of named Plaintiffs is not a prerequisite to court approval."); *Horton v. Merrill Lynch*, 855 F. Supp. 825 (E.D.N.Y. 1994) (approval over objections of majority of named Plaintiffs).

Even faced with vociferous objection to a proposed settlement, the court has a fiduciary responsibility to protect the interests of silent class members. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987).

In this case, the vast majority of class members (85%) have not voiced any objections to the Consent Decree. That high percentage is certainly evidence that the settlement is not unfair or inadequate in the opinion of the class. Several objectors believed that one or two provisions of the settlement are unfair and asked the Court to disapprove the entire settlement on that basis or to direct counsel for the parties to revise the objectionable provisions.

Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled. After carefully considering the objections, the Court concludes that the Consent Decree as a whole is fair, reasonable, and adequate to the class. Accordingly, the Court will not deny final approval on the basis of those objections.

In addition to the specific factors which guide a court's review of a class action settlement, there is a strong public policy favoring settlement of litigation. The Supreme Court has emphasized the strong Congressional preference for encouraging voluntary settlements of Title VII actions. The Court has explained that "Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . cooperation and voluntary compliance were selected as the preferred means for achieving this goal." *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974). Other courts also have recognized the importance of this policy. *See, e.g., Parker v. Anderson*, 667 F.2d 1204, 1209 (5th

Cir.) (approved settlement will not be upset unless court clearly abused its discretion; limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement), *cert. denied,* 459 U.S. 828 (1982); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978) (reconciliation and settlement are "preferred means for resolving employment discrimination disputes"), *cert. denied,* 439 U.S. 1115 (1979); *In Re Domestic Air Transp. Antitrust Litigation,* 148 F.R.D. 297 (N.D. Ga. 1993) (in determining whether to approve class action settlement, the district court must be guided by strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement); *Hammond v. Barry,* 752 F. Supp. 1087, 1100 (D.D.C. 1990) ("well settled that, particularly in class action suits, there is an overriding public interest in favor of settlement"); *Ellis v. Naval Air Rework Facility,* 87 F.R.D. 15, 18 (N.D.Cal. 1980) ("cooperation and voluntary compliance are the preferred means for achieving the statutory goals of Title VII").

Opting Out of the Settlement Agreement

Despite the many positive features of the proposed Consent Decree, the Court remains concerned by the number of dissenters. That concern relates to an issue that remains unresolved by the proposed Consent Decree, that of the right of class members to opt out of the proposed class settlement in order to retain the option to bring an individual lawsuit under Title VII. The Court concludes that allowing for "opting out" in this case would be the course of action most consistent with the purposes of the statute, and hereby grants those sixteen members of the class who have indicated the desire to opt out of this class settlement the right to do so.

But the Court will also allow those sixteen members additional time, until November 30, 1996, to reconsider

their decision to opt out, and to rejoin the class settlement. After November 30, 1996, however, any of the sixteen members who have not rejoined the class settlement can ony gain relief by fully complying with all procedural requirements of Title VII and, if so satisfying those requirements, by bringing their own, separate, individual actions under Title VII.[2] They will receive no monetary benefits from the settlement.

Allowing for "opting out" is consistent with the case law and the best interests of justice. It is clear that the Court has the authority to take this action. The authority of a court to approve a Consent Decree in this or any action brought under Title VII is derived from the statute itself and not the consent of the parties. *See Firefighters Local No. 1784 v. Stotts et. al.*, 467 U.S. 561, 576 (1984). The court may modify any such decree to serve the purpose of the statute. *Turner v. Orr*, 759 F.2d 817, 825 (11th Cir. 1985). Particularly is this so in this case, where the parties have specifically presented the issue to the Court for resolution.

In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), the parties presented a consent decree for approval to the district court which arose from a settlement negotiated by the parties. The district court made substantial modifications to that consent decree and the court concluded that it must be certain that a settlement "does not unfairly impinge on the rights and interests of dissenters." *Id.* at 1214. In *Reynolds v. King*, 790 F. Supp. 1101, 1107 (M.D. Al. 1990), the court rejected a settlement agreement in a class action challenging the Alabama Highway Department's alleged employment discrimination and warned that a court must

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[2] The Court understands that three members of the plaintiff class who had previously asked to "opt out" of the proposed settlement have now asked to rejoin the settling class. The Court hereby grants their request.

be careful to scrutinize whether, under a proposed settlement, the interests of certain class members are sold out.

But the most relevant precedent is *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). In that case, the circuit court held that a district court had abused its discretion by failing to allow opt out from a 23(b)(2) class that was facially unfair. In the decision, the court extensively discussed the applicability of opting out in a (b)(2) class action and concluded that when the damages stage of such actions take on the appearance of a (b)(3) action, a district court has discretionary power under rule 23(d) to allow "opt out" and design the procedures for such an action. *Id.* at 1153-56. It is appppropriate to allow for "opt out" when the monetary relief stage of a particular Title VII lawsuit is functionally more similar to a (b)(3) class than to a (b)(2) class.

Here, Defendant argues that "opt out" should not be authorized in this (or, presumably, any) Rule 23(b)(2) class settlement. Defendant points to the long-standing concern that future defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, and argues that the government did not bargain for a spate of individual claims following settlement.

However, the facts of this matter do not give weight to Defendant's theoretical concerns. Only 16 members have chosen to opt out of the settlement class. Some number of those opt outs may yet choose to opt back into the class before November 30, 1996, as this Court has decreed; others, likely, may never bring or never be able to support an individual Title VII action. The Court has no reason to conclude with Defendant that those members of the class who would "opt out" are, in fact, those members with the strongest Title VII claims. What is more, if Defendant is right and those who want to opt out do have the strongest cases, what a grave injustice would then

be done to those parties if this Court were to extinguish their individual rights.

The Court has been impressed with the vehemence with which some members of the class have opposed the settlement. It is quite clear that those members will believe themselves to have been "sold out" if this Court refuses to allow opt out of the settlement.

At the heart of this issue is the question of what distinguishes a (b)(2) class from a (b)(3) class. "At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries." 706 F.2d at 1154. The concern of this Court is that, in the absence of allowing for "opting out" some searing individual injury might be greatly under compensated. It would be terribly unfair to any African-American who may have been denied the opportunity to serve his country at the highest level of the diplomatic corps as a result of employment discrimination to be denied the opportunity to prove his or her individual claim. Justice demands that a defendant not be permitted to paper over any such injury if, in fact, it has occurred.

CONCLUSION

The Court wishes to congratulate the parties for performing admirably in resolving a complex and difficult matter. Counsel representing both Plaintiffs and the Defendant have performed in an exemplary fashion. In particular, the Court wishes to single out Magistrate Judge Alan Kay, who mediated the controversy, for his superb efforts. All participants who have worked so hard to resolve this matter should be proud of this settlement. The settlement, in conjunction with allowing for "opting out" by those who elect to do so, provides an excellent framework for correcting and redressing employment discrimination at the Department of State.

That having been said, the Court does repeat its request that the Secretary of State voluntarily establish some process for looking at the 15 or so African-Americans who still seek reinstatement or some other action with respect to their individual cases. It is surely not in keeping with the spirit of the settlement and the expressed desires of a concerned Administration to deny reinstatement or some other form of action simply because of the admittedly arbitrary limitations of the settlement agreement. While the Court understands that there is some possibility that others within the Department might question the establishment of an ad hoc process, the ability to do so should not be insurmountable.

The Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. Further, with respect to the issue presented by the parties as to whether certain members of the class may "opt out" of the settlement, the decision of this Court is to grant them the right to do so. An appropriate order is attached hereto.

Date: 11/7/96

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

[Filed Nov. 7, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*,
Plaintiff,

v.

WARREN CHRISTOPHER,
Secretary of State,
Defendant.

Civil Action No. 86-02850
(Judge Stanley Sporkin)

ORDER

Plaintiffs' case was originally brought in October 1986. On January 31, 1996, counsel for the plaintiff class agreed to recommend a settlement to the approximately 360 putative class members. The terms of the settlement are embodied in a Consent Decree, which was signed by the parties on January 31, 1996, and then submitted to the Court for its approval. The Court held a preliminary hearing on the Consent Decree on March 13, 1996 and after hearing counsel and certain proponents and objectors granted preliminary approval of the Consent Decree on March 22, 1996. The Consent Decree and a court-approved notice, informing members of the class of their rights with respect to the Consent Decree, was then sent to all known members of the class. The Court subsequently held Fairness Hearings on July 15, 1996, July 22, 1996 and July 23, 1996 and had an additional hearing on September 19, 1996.

Upon consideration of the Consent Decree, the relief awarded therein, and all objections presented by affected class members, and for the reasons stated in the attached Memorandum Opinion, the Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. By approving the Consent Decree, the Court hereby certifies a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The Court also finds that allowing for "opting out" by those sixteen members of the settlement class who will choose to do so is consistent with the best interests of justice. The Court allows those sixteen members additional time, until November 30, 1996, to reconsider their decision to opt out, and to rejoin the class settlement. Their failure to do so shall preclude them from participating in or receiving any of the monetary benefits provided for by the settlement agreement.

The three members of the plaintiff class who had previously asked to "opt out" of the proposed settlement and have now asked to rejoin will be allowed to do so and it is so ordered; and it is further ORERED that the Consent Decree be APPROVED, with the exceptions noted.

Date: 11/7/96

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

[Filed May 27, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5004

WALTER J. THOMAS, *et al.*,
Appellees

BERNARD JOHNS, *et al.*,
Amicus

v.

MADELEINE K. ALBRIGHT,
Secretary of State,
Appellant

Consolidated with 97-5018

BEFORE: Edwards, Chief Judge, Ginsburg, Circuit Judge, and Buckley, Senior Circuit Judge.

ORDER

Upon consideration of the petition for rehearing of appellees/cross-appellants filed May 12, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
MARK J. LANGER
Clerk

By: //s Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Mar. 22, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2850 (SS)

WALTER J. THOMAS, *et al.*,
Secretary of State,
Plaintiffs,

v.

WARREN CHRISTOPHER,
Secretary of State,
Defendant.

ORDER GRANTING PRELIMINARY APPROVAL
OF CONSENT DECREE

The foregoing Consent Decree, is preliminarily approved by the Court this 22nd day of March, 1996. The attached Notice is also approved by this Court as being sufficient to provide the notice to members of the plaintiff class required by Rule 23(e) of the Federal Rules of Civil Procedure. Further, the attached Department Notice and ALDAC are approved by this Court as being sufficient to provide notice to all Foreign Service Officers and career candidates employed by the State Department as of Preliminary Approval in accordance with Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n) that one or more terms of this Consent Decree might adversely affect their interests and legal rights and to advise them that they will have an opportunity to present objections to the Consent Decree at the Fairness Hearing scheduled pursuant to Rule 23(e) of the Federal Rules of Civil Procedure at the date and time specified below.

The parties are directed to proceed with notice to the class and other actions necessary to the Final Approval of the Consent Decree in accordance with the following schedule:

1. Final date for notice to the class—April 18, 1996.
2. Final date for receipt of objections to the Decree—June 11, 1996.
3. Fairness Hearing—July 15, 1996 at 10:00 a.m.

/s/ Stanley Sporkin
United States District Judge

Date: 3/22/96

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2850 (SS)

WALTER J. THOMAS, *et al.*,
Plaintiffs,

v.

WARREN CHRISTOPHER,
Secretary of State,
Defendant.

NOTICE OF FAIRNESS HEARING
ON PROPOSED CONSENT DECREE

TO: ALL CLASS MEMBERS

A proposed settlement has been reached in the above-captioned case. The class to which the settlement applies includes all African-Americans who were State Department Foreign Service Generalist Officer or Foreign Service Generalist Officer career candidates at any time during the time period mentioned below. The allegation on behalf of the class is that they were discriminated against on the basis of race in promotions, awards, tenuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, and training assignments or retaliated against for their participation in equal employment opportunity activities during the period from January 20, 1984, through the date of Preliminary Approval of this Consent Decree. If you are a class member, this proposed settlement will affect you and will extinguish any rights you may have to challenge any of the above employment practices and reprisal which you believe may

have affected you between January 20, 1984 and the date of Preliminary Approval of this Consent Decree.

In lieu of further litigation, the parties have arrived at a proposed settlement in this case set forth in the attached proposed Consent Decree, which representatives of the plaintiffs' class, counsel for the plaintiff class and the defendant believe represents a fair compromise in resolution of the plaintiffs' claims. The Court also has reviewed the proposed Consent Decree and has preliminarily concluded that it is fair. The Consent Decree does not represent an admission of liability by the Department of State, but rather a compromise resolution of the case.

The Consent Decree does not provide for the right of any members of the plaintiff class to opt out of the Consent Decree. The Court has expressed its intention to decide whether the right to opt out exists and, if so, to whom it may apply. Accordingly, if you have any interest in opting out of the settlement, you must file with the Court by June 11, 1996, a statement of such interest and the reasons why you wish to opt out of the settlement. Be advised, however, that the Court has not yet determined whether you have such a right to opt out and the Department of State has argued to the Court that it doesn't have the authority to allow opt outs from the Consent Decree. Barbara B. Hutchinson and Theresa Watson, counsel for twenty named plaintiffs have argued to the Court that it does have the authority to allow opt outs from the Consent Decree. If you are allowed to opt out of the settlement, you will have the opportunity to present your individual claim of discrimination to the Court. But, you will give up any right to relief under this Consent Decree and you will have to retain your own legal counsel or, if you lack sufficient resources, apply to the Court for the appointment of counsel rather than rely upon class counsel to represent you. You must understand that since this is a civil case, the Court is not obligated to appoint coun-

sel for you. Any appointment of counsel will be in the discretion of the Court. Even if you file a statement expressing your interest in opting out of this settlement, however, you must still comply with any procedures that apply to you as set forth in the Exhibit F to the attached Consent Decree to protect your interest.

For further information concerning the proposed Consent Decree you should contact any of the following attorneys as soon as possible:

WARREN E. CONNELLY, P.C.
MICHAEL J. MADIGAN, P.C.
CHARLES L. WARREN, P.C.
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Facsimile Phone: 301) 577-3764

THERESA L. WATSON
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-3794
Facsimile Phone: (202) 347-6757

You may submit to the Judge any written comments or objections you may have concerning the proposed settlement. If you choose to submit comments or objections you must file them in writing and include: (1) a heading that reads *"Thomas v. Christopher,* Civil Action No. 86-2850 (SS);" (2) your name, address, and telephone number; (3) a specific description of your comments or objections; (4) whether you believe that you are a potential class member and whether you seek or decline any relief under this Consent Decree; and (5) a separate, signed statement certifying that you sent copies of your comments or objections to attorneys for plaintiffs and attorneys for defendant and the date on which you sent them. You must send an original and 2 (two) copies of your comments or objections to the Court and 1 (one) copy each to counsel for plaintiffs and counsel for defendant at the following addresses:

(1) Clerk
United States District Court
United States District Courthouse
3rd and Constitution Ave., N.W.
Washington, D.C. 20001

(2) Warren E. Connelly, P.C.
Michael J. Madigan, P.C.
Charles L. Warren, P.C.

Richard P. Schlegel, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
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Suite 400
Washington, D.C. 20036

Joseph M. Sellers, Esq.
Avis E. Buchanan, Esq.
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Carl E. Anderson, Esq.
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH 44113

Barbara B. Hutchinson, Esq.
7907 Powhatan Street
New Carrollton, Md. 20784

Theresa L. Watson
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

(3) Cynthia Schnedar
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001

Your comments or objections must be received by the Court no later than June 11, 1996 in order to be considered by the Court. You may also appear in person to present your comments or objections orally at a hearing which will be held to consider whether the proposed Consent Decree should be made final. That hearing will be held before United States District Judge Stanley Sporkin at 10:00 a.m. on July 15, 1996, in Courtroom No. 6 at

the United States Courthouse at the above address. If you wish, you may retain your own attorney at your own expense to represent you in making written comments or objections or making arguments at the hearing.

Twenty named plaintiffs have objected to the approval of the Consent Decree on the basis that it fails to provide an adequate remedy for the claims of promotions, awards, tenuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments and retaliation. These individuals are represented by Barbara Hutchinson and Theresa Watson.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2850(SS)

WALTER J. THOMAS, *et al.*,
Plaintiffs,

v.

WARREN CHRISTOPHER,
Defendant.

JOINT NOTICE OF FILING

PLEASE TAKE NOTICE that the parties hereby jointly file the attached Consent Decree, with all Exhibits, for preliminary and final approval. Counsel for the plaintiffs and for the defendant have signed the Decree on behalf of those parties. The parties jointly recommend that the Court give the Consent Decree its preliminary approval on the grounds that the Decree appears to be fair and equitable as written.

The Decree provides substantial monetary relief to the plaintiffs. In addition, it contains measures directed towards the Department of State's selections and personnel actions. It provides for record keeping and review by the plaintiffs of those personnel actions. Moreover, a number of key provisions will take effect upon Preliminary Court Approval, for example, the statistical reporting contained in paragraph IV.D.3. of the Decree and the selection of a consultant, pursuant to paragraph IV.E.5., to advise the Department as it initiates the job analysis project required by paragraph IV.E.4. of the Consent Decree. After Preliminary Court Approval, all potentional class members and employees of the Department of State will be notified as provided in paragraphs VIII.B. and E.

The parties further request that the court schedule a Fairness Hearing during which any objections or concerns

regarding this Decree may be aired. By the terms of this Decree, the Fairness Hearing is scheduled for July 15, 1996. A Notice of Fairness Hearing for the Court's signature is attached to the Consent Decree as Exhibit A.

Respectfully submitted,

/s/ Eric H. Holder, Jr.
ERIC H. HOLDER, JR.
#303115
United States Attorney
(202) 514-6600

/s/ Warren E. Connelly
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/s/ Joseph M. Sellers
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Counsel for the Defendants

Counsel for the Plaintiffs

DATED: March 18, 1996

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2850 (SS)

WALTER J. THOMAS, *et al.*,
Plaintiffs,

v.

WARREN CHRISTOPHER,
Secretary of State,
Defendant.

CONSENT DECREE

In October 1986, named plaintiffs Walter J. Thomas and Bernard Johns filed this class action lawsuit in United States District Court against the United States Department of State ("the Department") seeking monetary and injunctive relief for alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 *et seq.* Plaintiffs alleged race discrimination and retaliation by the Department in a variety of personnel practices as described in more detail below. By Order dated July 20, 1987, the Court denied plaintiffs' motion for class certification. By Order dated April 28, 1988, the Court denied the motion for reconsideration but permitted several additional current and former African-American Foreign Service Officers ("FSOs") and career candidates to intervene and obtain additional discovery in support of a renewed motion for class certification.

Following several years of additional discovery, plaintiffs filed a renewed motion for class certification on June 15, 1994. Defendant filed his opposition on September 14, 1994. A week-long class certification hearing was scheduled for February 13, 1995. The parties jointly requested

the Court to defer the hearing when it appeared that they would be able to settle the case without litigation.

In the interest of avoiding the expense, delay and inconvenience of further litigation of the issues raised in this action, and in reliance upon the representations contained herein, and in consideration of the mutual promises, covenants and obligations in this Consent Decree, and for good and valuable consideration, plaintiffs and defendant, through their undersigned counsel, hereby stipulate and agree as *follo*ws:

I. SCOPE OF THE CONSENT DECREE

This Consent Decree resolves all claims that were or could have been brought by any African-Americans who were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984, and the date of Preliminary Approval of this Consent Decree on grounds of discrimination on the basis of race in promotions, awards, tenuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, and training assignments, or on the basis of retaliation against them for their equal employment opportunity activities during the period from January 20, 1984, through the date of Preliminary Approval of this Consent Decree.

II. DEFINITIONS AND GENERAL PROVISIONS

A. DEFINITIONS

1. The following terms used in this Consent Decree are defined as follows:

a. "Plaintiff class" or "Class Member(s)"—These terms refer to African-Americans who were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and the date of Preliminary Approval of this Consent Decree. A list of known class members is filed under seal at Exhibit .

b. "Duration of this Decree" or "Term of this Decree"—These terms refer to the period described below in Section V.

c. "Effective date of this Decree"—This term refers to the date of Final Approval of this Consent Decree as defined below, unless otherwise expressly provided herein.

d. "Preliminary Approval"—This term refers to that date, following submission of this Consent Decree to the Court by the parties but prior to the conduct of a Fairness Hearing, on which the Court grants initial approval of the Consent Decree.

e. "Final Approval"—This term refers to that date, following the conduct of a Fairness Hearing and approval of this Consent Decree by the Court, on which any and all appeals from any objections to the Consent Decree have been dismissed, a final appellate decision upholding approval has been rendered, or the time for taking an appeal has expired without an appeal having been taken. If there are no objections to the Consent Decree, this term refers to that date, following conduct of the Fairness Hearing, on which the Court grants Final Approval of the Consent Decree.

f. "Plaintiffs' counsel" and "Counsel for plaintiffs"—These terms refer collectively to all counsel of record for the plaintiff class. They are Akin, Gump, Strauss, Hauer & Feld, L.L.P.; The Washington Lawyers Committee for Civil Rights & Urban Affairs; and Walter & Haverfield. Where this Consent Decree provides for rights or responsibilities of counsel for plaintiffs, all counsel of record shall be entitled to those rights and responsibilities; however, all counsel of record for plaintiffs must sign any motion filed to enforce any of the terms of this Consent Decree or to take any other action authorized to be taken by "plaintiffs' counsel" or "counsel for plaintiffs" counsel" or "counsel for plaintiffs" under the terms of this Consent Decree.

g. "Counsel for the parties"—This term refers to counsel for plaintiffs and counsel for the defendant.

h. "Reasonable attorneys' fees plus costs as provided by law"—This term refers to the amount of fees, expenses and costs to be paid consistent with the standards governing the payment of attorneys' fees, expenses and costs under Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d).

i. "Employment practices"—As used in this Consent Decree, this term refers to promotions, awards, tenuring, terminations, performace evaluations, selection out, post and duty assignments, conal assignments, and training, assignments.

j. "Retaliation"—As used in this Consent Decree, this term refers to retaliation against an individual for his or her participation in equal employment opportunity (EEO) activities or for his or her opposition to discriminatory employment practices during the period from January 20, 1984, through the date of Preliminary Approval of this Consent Decree.

k. "Uniform Guidelines"—This term refers to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1978). To the extent the terms of this Consent Decree conflict with 29 C.F.R. Part 1607, the Consent Decree shall govern.

B. GENERAL PROVISIONS

1. This Consent Decree constitutes both an order of the Court and a contract, and all of its provisions are enforceable by the parties. No provision of this Consent Decree is intended to be, or be interpreted as, a prospective waiver of Title VII rights by any member of the plaintiff class.

2. No provision of this Consent Decree is intended as, or is properly interpreted as constituting ,a quota, timetable or goal.

3. The relief set forth in this Consent Decree will constitute full and final relief for any and all claims alleging racially discriminatory employment practices and reprisal by the Department occurring up to the date of Peliminary Approval for all members of the class. Upon Final Approval of this Consent Decree, the class as a whole and each class member shall be bound by the doctrines of res judicata and collateral estoppel with respect to all claims.

4. The parties to this action have entered into this Consent Decree as a compromise measure to terminate this action and resolve all issues in the class complaint filed in this action. The terms of this Consent Decree, the negotiations leading up to this Consent Decree, the date, documents, or information exchanged between the parties in the course of those negotiations, may not be offered, taken, construed, or introduced as evidence of liability or as an admission or statement of wrongdoing by the Department, either in this action or in any subsequent proceeding of any nature.

III. CERTIFICATION OF THE CLASS

The parties agree that the Court, by approving this Consent Decree, shall be certifying a class pursuant to Federal Rule of Civil Procedure 23(b)(2) of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984, and the date of Preliminary Approval of this Consent Decree.

IV. RELIEF

A. *MONETARY RELIEF*

1. Defendant shall pay to the plaintiff class the total sum of three million eight hundred thousand dollars ($3,800,000), less deductions specified below, in full, complete and final satisfaction of all claims for monetary relief arising out of plaintiffs' allegations of discrimination

in employment practices and retaliation including, but not limited to, claims for backpay, front pay, compensatory damages and interest and includes any and all payments to class members receiving retroactive promotions and being brought back for new limited term of appointments. The money shall be distributed by the Department of State to individual class members in the manner described in Exhibit F. A sum will be allocated to satisfy claims for front pay and shall be distributed pursuant to Exhibit F. The Defendant shall, upon request, render reasonable assistance in the calculation of relief described in Exhibit F.

2. The sum specified in paragraph IV (A)(1) shall be distributed less deductions for federal income taxes (20%), Medicare taxes (1.45%) and any other routine payroll deduction required by law, to each of the recipients of monetary relief. If a class member provided monetary relief under this Decree is deceased, the amount shall be paid to his or her estate. Counsel for plaintiffs shall provide defendant with sufficient information regarding the deceased person's estate to permit such payment; if plaintiffs' counsel is unable to provide such information within 3 (three) months of Final Approval, the payment shall be distributed to the class according to the formula and procedures described in Exhibit G.

3. If, 8 (eight) months after these monetary payments are made, any class member provided monetary relief has declined it, cannot be located, or does not receive it for any other reason, the amount to which this class member was entitled shall be distributed to the class according to the formula and procedures described in Exhibit G.

B. *INDIVIDUAL RELIEF*

1. The parties have agreed that 16 (sixteen) class members will receive retroactive promotions in the mid-grades (Grades 3, 2 and 1) (including backdated promotions that do not result in a change in current grade for the employees). These promotions are to be allocated

among those class members currently or formerly in the mid-level grades who were at some point between January 20, 1984 and the date of Preliminary Approval of this Consent Decree recommended but not reached for promotion to those grades. The defendant will initiate action to effectuate the mid-grade promotions within 30 days of the effective date of the Consent Decree. The parties have agreed that on (1) class member will receive a retroactive promotion from FE-OC to FE-MC in the senior grades (including a backdated promotion that does not result in a change in current grade for the employee). That promotion will be granted to an individual currently or formerly in the senior grades who was at some point between January 20, 1984 and the date of Preliminary Approval of this Consent Decree recommended but not reached for promotion to FE-MC. Thirty days after the effective date of the Consent Decree, the defendant will include the name of the person to be promoted to FE-MC on the next list of nominations for the Senior Foreign Service sent to the Senate for Advice and Consent. The parties have agreed that these retroactive promotions will be given to the 17 (seventeen) individuals identified through the procedures described in Exhibit F to this Consent Decree. No class member other than the individuals identified by the parties shall be entitled to receive a promotion under this Consent Decree or to pursue any promotion based on a claim of racial discrimination or retaliation that is encompassed within the settlement of this lawsuit. Plaintiffs' counsel shall notify each of the 17 class members who will receive individual promotion relief ("recipient") at the time this Decree is sent to the class members for their approval. No recipient will receive any 'cascaded" promotions into the Senior Foreign Service or be promoted into the Senior Foreign Service as a result of this Consent Decree.

2. As to each class member receiving a promotion under this Consent Decree, the Department will amend the Official Performance File ("OPF"), Personnel Audit Re-

port ("PAR"), and the Administrative File; annotate the Personnel Scorecard and the Career Development Officer's ("CDC") File; and will maintain such records, as well as future Biographic Registers as long as they are in existence (provided that the OPF Files have been amended), in a manner that reflects that a promotion provided pursuant to this Decree, including retroactive promotions, retroactive step increases, retroactive FE salary level increases, and prospective salary increases, was provided on the dates specified above through the usual means by which FSOs receive promotions and other salary increases and not as a result of this Decree. Defendant will not count for purposes of time-in-class calculations any period of time between the date on which each class member receiving a retroactive promotion was originally promoted to any class and the date on which each was retroactively promoted to the class as a result of this Consent Decree. A class member may waive in writing within 30 (thirty) calendar days of notification the right to have any or all of the above records amended. If the class member waives the right to have any or all of the records amended, the Department may nonetheless create "personnel action" documents (e.g., Standard Form 50) that are necessary to ensure that the class member is treated for purposes of future step and salary increases and his or her pension as if the class member received the relief which the class member was provided under this Decree. However, a class member must have his or her Official Performance File and Administrative File amended in order for his or her pension to be fully adjusted if he or she separates from the Foreign Service within three years of the effective date of his or her retroactive promotion.

3. Within 90 (ninety) days after the effective date of this Consent Decree, four (4) specific class members who were separated for failure to achieve tenure will be offered a new five year limited term appointment in the Foreign Service as Junior Officer Candidates in the next available Junior Officer Class during which they will be eligible to

earn tenure in accordance with the applicable regulations and procedures. These four class members will be identified using the procedure specified in Exhibit F. No other class member shall be entitled to reinstatement pursuant to this Consent Decree. No class member may pursue any previous tenuring board's decision not to grant tenure based on a claim of racial discrimination or retaliation that he or she may have that is encompassed by the settlement of this lawsuit. Authenticated or certified copies of the original, unamended Official Performance Folder, Personnel Audit Report, and Selection Board Scorecard may be retained in the files of the Office of the Legal Adviser. This file shall be maintained in confidence and may not be used or referred to for the purpose of any personnel action other than in litigation to which it may be relevant.

C. *INJUNCTIVE RELIEF*

The Department reaffirms its obligation and commitment to ensure equal employment opportunity for all employees. The Department shall not discriminate on the basis of race in promotions, awards, tenuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, or training. The Department shall not retaliate against a class member for his or her participation in equal employment opportunity activities.

D. *COUNCIL FOR EQUALITY IN THE WORKPLACE*

1. The Department shall form a Council for Equality in the Workplace ("the Council"). The Council shall act as the Department's executive coordinating committee for the purpose of advancing EEO and civil rights goals and of supporting the efforts of the Office of Equal Employment Opportunity and Civil Rights which will continue to have the central role in the EEO process. The Council shall be composed of eight members and shall be chaired

by the Under Secretary of State for Management. In addition to the Under Secretary for Management, members of the Council shall include the Director General, the Legal Adviser, the Deputy Assistant Secretary for Equal Employment Opportunity and Civil Rights, a Deputy Assistant Secretary for Personnel, a representative of the exclusive bargaining representative for State Foreign Service employees (currently the American Foreign Service Association), and two other career employees of the Department to be appointed by the Under Secretary for Management, in consultation with the staff of the Secretary of State. At least one woman and one African-American will be among the Council's members.

2. "Bureau" as used in this Consent Decree shall include the overseas posts and missions relating to each bureau.

3. Within 120 (one hundred twenty) days after the preliminary approval of this Decree and every 12 (twelve) months thereafter for a total of 4 (four) years, the Office of Equal Employment Opportunity and Civil Rights (S/EEOCR) shall provide to the Council a report which provides the following information on a bureau and Department-wide basis:

a. The number of Foreign Service Generalist officers broken down by race;

b. A breakdown by race of Foreign Service generalists who occupy:

(i) Deputy Chief of Mission positions;

ii. Program direction positions;

iii. All positions classified at each grade level;

c. The number of honor award recipients broken down by race and type of award for the preceding 12 (twelve) months;

d. A breakdown by race and career or political status of all ambassadorial positions, Assistant Secretaries and equivalents, and Deputy Assistant Secretaries and equivalents. However, plaintiffs recognize that a significant number of such appointments are not the responsibility of the Department of State.

4. The Council may request that EEOCR provide additional information it may consider necessary for its work. It may not be inferred from any request for information that the Council has identified a problem requiring further investigation or that the Department of State is responsible for the underlying activities.

5. S/EEOCR will provide bureau-specific and appropriate aggregated Department-wide data as specified in paragraph 3 above to each Assistant Secretary or bureau head.

6. Each Assistant Secretary or bureau head will, within 90 (ninety) days of receiving the information from S/EEOCR:

a. Share the data within his or her bureau;

b. Consult widely within his or her bureau to identify any perceived barriers to advancement or imbalance in opportunities on the basis of race which may exist within the bureau or Department;

c. Provide to the Council a written report describing the bureau-level consultations, summarizing the results of those consultations, outlining recommendations and action plans as appropriate for addressing any perceived or real barriers to advancement or imbalance in opportunities on the basis of race it has identified, and describing the actions taken with regard to recommendations made by the Council pursuant to paragraph 7 below in the prior years.

7. Following its review of the bureau reports specified in paragraph 6 (as well as those submitted under para-

graph 3 or paragraph 4), the Council shall meet with Assistant Secretaries, other bureau heads and, whenever it deems appropriate, other Department personnel, in order to make policy recommendations with respect to relevant employment practices and reprisal that affect advancement and opportunity in the Foreign Service. Such recommendations may include, but are not limited to, recommended modifications to bureau or Department policies, procedures, and practices in the following areas: assignments, career development, performance evaluations, promotions, training, and honor awards. In developing these recommendations, the Council shall review and consider relevant reports, recommendations, and analyses prepared by internal and external agencies, task forces and committees bearing upon the subject of employment discrimination within the Foreign Service.

8. In addition, the Council, no less than once per year, shall notify all Foreign Service employees of the Department that any Foreign Service employee who believes that a barrier to advancement or imbalances in opportunity in the Foreign Service on the basis of race exists may report, anonymously if preferred, that perceived barrier or imbalance to the Council. This notification shall state that a report to the Council is not a substitute for filing an EEO complaint pursuant to 29 C.F.R. 1614 or for raising EEO concerns through the Foreign Service Grievance System or any negotiated grievance procedures. Employees must meet any prescribed filing time limitations under those procedures and their reports to the Council shall not serve to suspend or toll those time limitations. The notification will be made through the following methods:

a. A "department Notice" distributed to all State Department domestic offices;

b. An ALDAC cable to be shared with all State (American, direct-hire) Foreign Service employees at overseas posts;

c. A notice in the Department of State newsletter which is currently published monthly.

9. While any Consent Decree remains in force in this lawsuit, plaintiffs' counsel may submit reports to the Council regarding barriers to advancement or imbalances in opportunity in the Foreign Service on the basis of race which they or members of their class believe exist at the Department.

10. The Council will review the submissions received for specific situations, trends, patterns, etc., with regard to any barriers, perceived or real, or imbalances in opportunity in the Foreign Service on the basis of race and based on that review will make appropriate recommendations as described in paragraph 7 above.

11. The Council shall prepare an annual report, notifying all Foreign Service employees of the Department of any barriers, perceived or real, to advancement or an imbalance in opportunity in the Foreign Service on the basis of race as identified in the foregoing process and shall summarize actions the Department has taken or will take with regard to any such barriers or imbalances. Such reports shall not be deemed to constitute admissions of unlawful discrimination in any administrative or judicial proceeding.

12. While any Consent Decree remains in force in this lawsuit, copies of the Council's annual report shall be made available to plaintiffs' counsel. The parties agree, however, that none of the reports or information provided to the Council, Assistant Secretaries or bureau heads, and none of the policy recommendations made by the Council may be offered, taken, construed or introduced as evidence for any purpose or as an admission or statement of wrongdoing by the defendant, either in this action or in any pending or subsequent proceeding of any nature.

E. *EMPLOYEE EVALUATION REPORTS*

1. The Department of State shall revise Section III A.2 of Form DS-1829 (U.S. Foreign Service Evaluation Report ("EER")), dated March 1993, by reducing the number of boxes from five to two. The first box shall be labeled "Recommend immediate promotion." The second box shall be labeled "Recommend additional experience at current grade." In addition, Section III would also include the following text relating to the Discussion of Potential:

> "B. Discuss below the rated employee's command of skills for successful performance in positons, interfunctional and/or in employee's cone or specialty, at the next higher grade. For those recommended for additional experience, the rater additionally should describe the specific experience needed and identify the competency or competencies listed in Section II, including skills in employee's cone or specialty, which that experience will develop."

2. The Instructions for Preparation of the EER shall be revised as shown in Exhibit D.

3. The revised Section III A.2 of the EER as described in paragraph 1 above shall be used starting January 1, 1995, and, unless extended by the parties, shall be used as the potential rating in the EER until the earliest of the following: (1) an alternative EER form or forms is implemented as a result of the process described in paragraphs 5 to 16 below; or (2) plaintiffs' counsel produce substantial evidence showing racial discrimination in the use of the revised Section III A.2, in which case the parties shall negotiate in good faith and as expeditiously as possible to agree on further changes designed to eliminate the discrimination. Notwithstanding the foregoing prior to completion of the process described in paragraphs 5 through 16 below plaintiffs' counsel may propose changes

to the revised EER at any time and for any reason, and the Department shall give any such proposals of the plaintiffs' counsel fair consideration. Nothing in this paragraph shall affect the Department's right to revise any section of the revised EER at any time except for Section III A.2. If the Department wishes to revise that section before an alternative EER form is implemented ,it shall do so in consultation with the plaintiffs' counsel.

4. As part of its overall personnel reform effort, the Department of State shall award a contract according to existing Federal Acquisition Regulations (Title 48 of the Code of Federal Regulations) for the performance of a job analysis which shall identify *inter alia* (1) tasks required for the job of Foreign Service Officer; and (2) knowledge, skills and abilities needed by Foreign Service officers.

5. The Department shall engage a consultant to advise and assist in the preparation of a Statement of Work for the job analysis project, and to advise the Department throughout the contracting process, subject to the conflict of interest provisions of Federal Acquisition Regulations 9.5. The Department shall select such a consultant from a list of candidates agreed to by both the Department and the plaintiffs' counsel and shall make its best efforts to retain the consultant within one hundred twenty (120) days of the preliminary approval of this decree.

6. The Department shall consult with plaintiffs' counsel regarding the draft Statement of Work, outlining the design and methodology for the job analysis, before the Request for Proposals is issued. Plaintiffs' counsel may suggest modifications to the draft Statement of Work and the Department shall give any such suggestions fair consideration.

7. The Department shall make its best efforts to issue the Request for Proposals for the job analysis within 120

(one hundred twenty) days after a consultant is engaged pursuant to paragraph 5 above.

8. After the Request for Proposals is issued, the Department shall establish a Technical Evaluation Panel to evaluate all proposals by firms bidding on the job analysis contract. The consultant engaged to assist the Department shall serve as a member of the Technical Evaluation Panel. The Technical Evaluation Panel shall prepare an analysis of which proposals are technically acceptable and which proposals are technically unacceptable. The contractor shall be selected from those firms found to be fully acceptable technically.

9. The Department shall make its best efforts to execute a contract for the job analysis project within 180 (one hundred eighty) days of issuance of the Request for Proposals.

10. The contract for the job analysis shall provide that in performing the job analysis the contractor shall establish a committee comprised of a representative designated by plaintiffs' counsel, the consultant engaged to assist the Department on the project, and one or more independent experts in job analysis, the latter to be chosen by the contractor with concurrence by the Department. The committee shall meet periodically at key points in the job analysis (*e.g.*, when the work plan is completed; when the draft survey instrument is completed) to receive information from the contractor on the status and plans and to review and discuss aspects of the survey.

11. The Department shall make its best efforts to ensure that the job analysis is completed within 270 (two hundred seventy) days atfer execution of the contract.

12. The contractor shall prepare a final written report of the job analysis results within 60 (sixty) days of the completion of the job analysis, unless good cause is shown for a delay beyond that date. Copies of the report shall

be provided to plaintiffs' counsel. If requested through the Department, the contractor shall also provide plaintiffs' counsel the data which underlie the job analysis, and shall meet with plaintiffs' counsel to explain the results of the job analysis and to answer questions regarding that analysis.

13. Based on the results of the job analysis and within 60 (sixty) days after the report is issued pursuant to paragraph 12 above, the consultant engaged pursuant to paragraph 5 above shall recommend whether the revised EER should be modified in order to ensure that the potential of tenured officers is assessed on the basis of the knowledge, skills, and abilities necessary to perform successfully at the next higher grade in the Foreign Service and that racial bias is minimized in that assessment. If the Department accepts the consultant's recommendation that the revised EER should be modified, it shall use the job analysis as a basis to devise a new evaluation form or forms. If the Department decides not to accept the consultant's recommendation, it shall provide plaintiffs' counsel with a detailed explanation of how the potential of tenured officers is assessed on the basis of the knowledge, skills, and abilities necessary to perform successfully at the next higher grade in the Foreign Service and racial bias is minimized in that assessment.

14. If the Department decides to issue a new evaluation form or forms based on the job analysis, the Department may engage the consultant to advise and assist in devising the requisite form or forms or, alternatively, it may engage a new consultant to assist in this task. If the Department engages a new consultant to assist in this task, the Department shall select such a consultant from a list of candidates agreed to by both the Department and plaintiffs' counsel.

15. Before designing any new evaluation form or forms for Foreign Service officers based on the job analysis, the

Department shall consult plaintiffs' counsel regarding the design of any new form or forms to be used. Plaintiffs' counsel shall also be provided periodic updates on progress made on the design of the form or forms. At the request of the plaintiffs' counsel, the Department shall also set up meetings with the consultant engaged to assist the Department in the design of the new form or forms.

16. Prior to issuing any new evaluation form or forms, the Department shall provide plaintiffs' counsel a draft of the form or forms and shall consider their recommendations and/or concerns before issuing the new form or forms in final. Plaintiffs' counsel may make recommendations or suggest changes to the new form or forms and the Department shall give any such suggestions fair consideration.

17. If the Department disagrees with any recommendations made by the plaintiffs' counsel with respect to the new evaluation form or forms, the Department shall, prior to issuing the form or forms, discuss with plaintiffs' counsel the reasons for the disagreement. If, after that discussion, the Department decides to reject the plaintiffs' counsels' recommendations the Department shall, prior to issuing any form or forms, provide plaintiffs' counsel with a detailed written explanation regarding why it disagreed and how the form or forms it has issued assess the knowledge, skills, and abilities as determined necessary to progress in the Foreign Service, as determined in the job analysis, and minimize racial bias in that assessment.

F. DIVERSITY TRAINING AND EEO AWARENESS

1. Within 90 (ninety) days of the preliminary approval of this Decree, the Foreign Service Institute ("FSI") shall revise, and/or, if necessary, expand (but not shorten) the two-day course entitled "EEO Awareness for Managers and Supervisors" (PT-107) and the EEO components of "Introduction to Management Skills" (PT-207) and

"Supervisory Studies Seminar" (PK-245) (which are equivalent to two days of training) to (1) focus on heightening participants' awareness of their diversity management style; (2) practice diversity management skills through interactive methodologies; (3) identify the strengths and weaknesses of these skills as well as ways to improve them; and (4) address methods and strategies for promoting a positive work environment and avoiding discrimination in ratings, assignments, and awards. FSI shall, as appropriate, draw on successful diversity training courses and seminars used within the United States Government and the private sector. The Department shall provide plaintiffs' counsel with a draft agenda, including a description of all activities and the goal of each activity. The Department shall change the name of "EEO Awareness for Managers and Supervisors" to "EEO/Diversity Awareness for Managers and Supervisors" to reflect the added focus on diversity management.

2. Within 90 (ninety) days of the preliminary approval of this Decree, FSI shall develop specialized EEO/diversity awareness training for all Foreign Service assignment panels, bureau awards committees, Selection Boards, Commissioning and Tenure Boards, career development officers and for the Board of Examiners to (1) focus on heightening participants' awareness of their own diversity management style; (2) practice diversity management skills through interactive methodologies; (3) identify the strengths and weaknesses of those skills and ways to improve them; and (4) address methods and strategies for recognizing and eliminating language and behavior that result in race bias in awards, assignments, promotions and the selection process for the Foreign Service. The Department shall provide plaintiffs' counsel with a draft agenda, including a description of all activities and the goal of each activity, of this training.

3. Beginning 30 (thirty) days after the "EEO/Diversity Awareness for Managers and Supervisors" course revisions

are implemented, the Department shall offer the course no less than six (6) times each year, and no less than once a month in each June, July, August, and September (unless the needs of the employees who are required to take these courses make it more reasonable to offer the courses in other months).

4. Within 90 (ninety) days of preliminary approval of this Decree, the Department shall, throughout the entire School of Professional Studies Training continuum, which includes but is not limited to such courses as mandatory orientation courses (e.g., PG-101 (also known as A-100)), the Advanced Consular Course (PC-532), Washington Tradecraft (PT-203), Supervisory Studies Seminar (PK-245), General Services Operations (PA-221), Personnel Management (PA-231), Deputy Chiefs of Mission course (PT-102), Ambassadorial Seminar (PT-120) and Senior Seminar (PG-501), revise, and/or if necessary expand, the current EEO awareness module in each course to (1) focus on heightening participants' awareness of their own diversity management style, (2) practice diversity management skills throughout interactive methodologies, (3) identify the strengths and weaknesses of those skills and ways to improve them, and (4) address methods and strategies for recognizing and eliminating language and behavior that result in race bias in awards, assignments, performance evaluations, and the tenuring and promotion process for the Foreign Service. The Department shall provide plaintiffs' counsel with a draft agenda of this revised training module, including a description of all activities and the goal of each activity. If the revised module is further revised in any substantive way, the Department shall provide plaintiffs' counsel with a draft agenda of the further revised module, including a descripton of all activities and the goal of each activity.

5. Within 90 (ninety) days of the preliminary approval of this Decree, FSI shall review the Performance Management Seminar, and revise and/ expand the course, where

appropriate, to include modules on diversity awareness training as it applies to the performance management cycle, including setting work requirements, counseling employees, and preparing evaluation reports. The Department shall provide plaintiffs' counsel with a draft agenda, including a description of all activities and the goal of each activity, of the revised or expanded modules.

6. Within 90 (ninety) days of the preliminary approval of this Decree, the Department shall revise, and/or if necessary expand, the current mandatory orientation/training for Selection Boards and Commissioning and Tenuring Boards to (1) focus on heightening participants' awareness of their own diversity management style, (2) practice diversity management skills through interactive methodologies, (3) identify the strengths and weaknesses of those skills and ways to improve them, and (4) address methods and strategies for recognizing and eliminating language and behavior that result in race bias in awards, assignment, promotions and the selection process for the Foreign Service. The Department shall provide plaintiffs' counsel with a draft agenda, including a description of all activities and the goal of each activity, of the revised or expanded orientation/training.

7. Within 90 (ninety) days of preliminary approval of this Decree, the Department shall design and develop a diversity awareness video training package for use overseas and domestically to address race bias in performance management practices such as work assignments, employee counseling, and evaluations. The Department shall provide plaintiffs' counsel with a copy of the program design and accompanying written materials.

8. During the course of each session of the newly revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills," and "Supervisory Studies Seminar," and each course which incorporates a diversity awareness module as described in

paragraph 4 above, the participants shall be given specific feedback from their peers and the instructor or a facilitator regarding their diversity management skills. As part of this feedback, each participant shall, except in the Washington Tradecraft course, practice his or her skills in managing diversity through interactive methodologies and shall receive feedback from peers and/or the instructor/facilitator regarding his or her skills.

9. All Department personnel (including Civil Service personnel), regardless of where assigned, who are supervising FSOs on the preliminary approval of this Decree and who have not taken the unrevised "EEO Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar" in the 36 (thirty-six) months prior to the preliminary approval of this Decree shall take the newly revised 'EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar" course. Department personnel who are assigned to Washington when this Decree is executed shall take the course within 18 (eighteen)) months of the preliminary approval of this Decree. Department personnel who are supervising FSOs on the preliminary approval of this Decree and who are assigned outside Washington on the preliminary approval shall participate in diversity awareness video training within 12 (twelve) months of the preliminary approval of this Decree and shall take the newly revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar" course within 24 (twenty-four) months of the preliminary approval of this Decree, or the next time they are transferred to another assignment, or are in Washington for TDY, including, *inter alia*, training and consultation (unless, despite reasonable efforts, they cannot take the course when they are in Washington for consultation), whichever is the earliest.

10. All Department personnel who are assigned to positions in which they will supervise FSOs after the preliminary approval of this Decree shall take the newly revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar," prior to or within 90 (ninety) days of beginning that assignment unless they have taken "EEO/Diversity Awareness for Managers and Supervisors" (PT-107) during the past 5 (five) years.

11. The Department shall make a good faith effort to ensure that all Foreign Service Officers who are not required by paragraphs 9 or 10 above to take the revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar" or a course which incorporates a diversity awareness module as described in paragraph 4 above shall take one of those courses within 36 (thirty-six) months of the preliminary approval of this Decree. In any event, all such Foreign Service Officers shall take one of those courses within 48 (forty-eight) months of the preliminary approval of this Decree.

12. All Department personnel who currently serve on assignment panels or bureau awards committees, as career development officers or on the Board of Examiners shall be required to take the training described in paragraph 2 above within 90 (ninety) days of the implementation of the training. All personnel who are assigned to these duties after the preliminary approval of this Decree shall take the training in pargraph 2 above within 60 (sixty) days of commencement of their duties or when they receive any other training in connection with those duties, whichever is earlier.

13. All Department personnel who are required under this Decree to take the newly revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar"

(or who were exempted from that requirement under paragraph 9 above because they took the unrevised version of one of those courses) or a course which incorporates a diversity awareness module as described in paragraph 4 above, shall be required to participate in diversity awareness video training within 35 (thirty-six) months of the date that they originally took one of those courses (or, if they were covered by the exemption in paragraph 9 above, the date that they took the unrevised "EEO Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar") and participate in diversity awareness video training every 36 (thirty-six) months thereafter, except that they must take "EEO/ Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" or "Supervisory Studies Seminar" or a course which incorporates an EEO/ diversity module as described in paragraph 4 above (instead of participating in video training) every 6 (six) years.

14. Beginning 90 (ninety) days after the preliminary approval of this Decree, the Department shall, in preparing transfer orders for FSOs who are required to take the newly revised "EEO Awareness for Managers and Supervisors" or a course which incorporates a diversity awareness module as described in paragraph 4 above at the time of their transfer or within 12 (twelve) months after their transfer, include a mandatory training order directing each such FSO to attend the required course.

15. Exceptions to required attendance at the newly revised "EEO/Diversity Awareness for Managers and Supervisors," "Introduction to Management Skills" and "Sueprvisory Studies Seminar" courses or a course which incorporates a diversity awareness module as described in paragraph 4 above shall be granted only in unusual circumstances and then only by the Office of the Director

General and under the condition that (a) an FSO who is assigned to Washington shall take the required course within 90 (ninety) days of the date by which he/she was originally required to take it or (b) an FSO who is assigned outside Washington shall take the required course within 36 (thirty-six) months of the preliminary approval of this Decree.

16. The Department shall make its best efforts to ensure that noncareer Department personnel who are required to take courses under this Consent Decree take those courses.

17. The National Foreign Affairs Training Center ("NFATC") shall develop a module on diversity and management for use with organization development interventions by bureaus throughout the Department of State as requested.

18. Within 180 (one hundred eighty) days of the preliminary approval of this Decree, the Department shall amend the Foreign Affairs Manual ("FAM") to reflect changes consistent with this Decree.

G. SUPERIOR HONOR AWARDS

1. The Director General of the Foreign Service shall appoint a working group which shall review individual Superior Honor Award nominations approved by the bureaus to ensure that these awards are granted in accordance with the regulatory criteria and to determine whether these awards reflect the racial composition of the bureau. This review shall assess individual non-group awards received by Foreign Service Officers and shall assess those awards by grade and across all grades in the year in which the review is being performed and in that year combined with the prior two calendar years. The Director General shall provide the working group the information it needs to perform this review. Plaintiffs' counsel shall be pro-

vided a copy of all information which the Director General provided to the working group. This review shall begin within 120 (one hundred twenty) days of the preliminary approval of this Decree, shall be undertaken annually thereafter, and shall take no longer than 90 (ninety) days. If the working group finds that the award nominations approved by a bureau do not reflect the racial composition of the bureau, it shall, within 3 (three) months of conclusion of the review, examine the circumstances under which the imbalance occurred; make recommendations to redress any particular or systemic problems which are identified and prevent their repetition in the future unless the working group finds legitimate (i.e., performance-based) reasons for the imbalance. Upon completion of each such process, the working group shall submit a report to the Director General and counsel for the parties which discusses its findings and recommended actions regarding any bureaus in which the award nominations did not reflect the racial composition of the bureau. Plaintiffs' counsel may submit in writing their own recommendations to the working group during the course of this process. The working group shall include in its report to the Director General a response to each written recommendation made by plaintiffs' counsel.

2. If the Director General decides not to take any action recommended by the working group, the Department shall provide counsel for the parties with a written explanation of why the Director General decided not to take that action and what alternative measures the Director General shall take to redress the problems raised by the working group.

3. Beginning 60 (sixty) days after Preliminary approval of this Decree, the Department of State shall transmit the attached ALDAC (Exhibit E) to remind supervisors that they must give full consideration for awards to all employees regardless of race, color, gender,

religion, or national origin. In subsequent years the Department shall incorporate the language in the attached ALDAC in the annual message on the Incentive Awards Program which is transmitted prior to the end of the rating cycle to remind supervisors of the requirement to submit all awards by May 1 if they are to be included in the Selection Board's review for that cycle.

4. Within 60 (sixty) days of the preliminary approval of this Decree and once a year thereafter the Director General shall brief bureau Assistant Secretaries and awards committee chairpersons about the importance of the awards program and their role in assuring that employees receive consideration for awards without regard to race.

H. CERTIFICATION OF SELECTION OUT PROCESS

1. When a Performance Standards Board is considering an African-American FSO Generalist for possible selection out, the Department will make its best efforts to include at least one African-American member on the Board. Within 60 (sixty) days of Preliminary Approval of this Decree and every year thereafter the Department will notify Plaintiffs' counsel within 30 (thirty) days of each instance in which an African-American is not included on a Performance Standards Board which is considering an African-American FSO Generalist for possible selection out, and will describe the efforts that were made to include an African-American on that Board.

2. Any such Performance Standards Board will present its findings under a transmittal memorandum, signed by all of its members, addressed to the Director General. The Department will modify the transmittal memorandum to include language that affirms that the Board:

a. received a briefing on equal employment opportunity before beginning its deliberations; and,

b. made its decisions on the factors identified in the Precepts.

I. ELECTRONIC PERSONNEL DATA BASE

1. The Department is in the process of converting and enhancing its current central personnel system (CPS) into an integrated data base that will permit it to generate and maintain data that will, *inter alia*, assist it in monitoring its success in achieving EEO goals. The Department shall use its best efforts to ensure that the Integrated Personnel Management System (IPMS) begins the implementation phase in December 1996.

2. The IPMS and related applications will permit the Department to collect and analyze data pertaining to personnel functions including but not limited to promotions, awards, tenuring and terminations by race.

3. The provisions of the Privacy Act and the Foreign Service Act, as amended, and other relevant laws concerning what safeguards are required for compilation of, access to, and use of this data base will be applied. The Department will ensure that the IPMS contains controls ensuring that data identifying individuals by race will be accessible only to persons authorized by law or regulation to receive or maintain such data.

J. MONITORING

1. *Reporting* On July 31 of each year in which the Consent Decree is in effect, for a total of 4 (four) years after Preliminary Approval, defendant shall report the following information covering the preceding twelve months from July 1 to June 30 to counsel for the plaintiffs:

a. *Total Population* The number of FSOs in each cone and at each grade level at the beginning of the reporting period, indicating separately the number of

African-American FSOs and Caucasian FSOs in each category;

b. *Program Direction Assignments* The number of FSOs who received assignments to Program Direction positions, by grade, during the reporting period, indicating separately the number of African-American FSOs and Caucasian FSOs who received Program Direction assignments. A list of positions currently designated as Program Direction assignments is attached to the Consent Decree as Exhibit H.

c. *Stretch Assignment* The number of FSOs who received upstretch or downstretch assignments at each grade level during the reporting period, indicating separately the number of African-American FSOs and Caucasian FSOs who received upstretch or downstretch assignment;

d. *Training Assignments* The number of FSOs at each grade level who received long-term training assignments during the reporting period, indicating separately the number of African-American FSOs and Caucasian FSOs who received long-term training assignments;

e. *Tenure Decisions* The number of career candidates who were eligible for and who received tenure during the reporting period, indicating separately the number of African-American career candidates and Caucasian career candidates who were eligible for and who received tenure;

f. *Honor Awards* For each type of award, the number of FSOs at each grade level who received honor awards during the reporting period, indicating separately the number of African-American FSOs and Caucasian FSOs who received honor awards;

g. *Diversity Training*

(i) The numbers of employees who were required to take courses pursuant to paragraphs IV(F) (1-13) during the time period covered by the report;

(ii) The numbers of employees who took the courses described in paragraphs IV(F) (1-13) during the time period;

(iii) The names of employees to whom the Office of the Director General granted an exception to attend one of the courses described in paragraphs IV(F) (1-13) during the time period, the reason why the employee did take it and the date the employee will take it;

(iv) The names of noncareer employees who were required to attend and did not attend one of the courses described in paragraphs IV(F) (1-13) during the time period and the efforts the Department made to ensure that person took the course;

h. *Promotions* The number of FSOs who received promotions in each grade and in each cone during the reporting period, indicating separately the number of African-American FSOs and Caucasian FSOs who received promotions; and,

i. *Selection Out* The number of FSOs who were selected out in each grade during the reporting period, indicating separately the number of African-American FSOs, if any, and Caucasian FSOs, if any, who were selected out.

j. Except as expressly provided above, no other reports need to be filed with the Court by defendant.

2. *Compliance* Within 90 (ninety) days of the date that defendant submits to the Court each report under subsection IV(J) above, counsel for plaintiffs shall notify defendant's counsel in writing whether plaintiffs believe that the Department of State was in compliance with this Decree during the preceding reporting period. Plaintiffs' counsel shall have the option of stating that plaintiffs need further information from the Department, which they shall specifically describe and request, in order to determine whether the Department was in compliance in the preced-

ing reporting period. If defendant is required to submit further information plaintiffs will within 90 (ninety) days after they have received such further information notify defendant's counsel in writing whether counsel for plaintiffs believe that the Department was in compliance during the preceding reporting period. If plaintiffs' counsel do not contact defendant's counsel on or before 90 days of the date that defendant submitted its report for the preceding reporting period, the Department of State shall be deemed to be in compliance with this Decree.

3. *Adverse Impact Measure* Counsel for the parties shall utilize the Uniform Guidelines as a guideline in measuring the information provided by defendant in subsection IV(J) to determine whether there has been an adverse impact.

4. Nothing in this Consent Decree shall be construed or interpreted to restrict or preclude the use of informamation provided under the monitoring provision (subsection IV(J)) by plaintiffs or plaintiffs' counsel for any purpose.

K. AFFIRMATIVE ACTION PLAN

The Department will maintain and, as appropriate, revise a current EEOC-approved affirmative action plan applicable to members of the Foreign Service. For purposes of this Consent Decree, an EEOC-approved plan shall mean a plan found by the EEOC to be in compliance with EEOC regulations and management directives in effect at the time the plan is submitted to EEOC.

V. TERM OF DECREE

A. This Consent Decree and all provisions thereof shall expire and shall be without force and effect 4 (four) years from the preliminary approval of the Consent Decree.

B. Plaintiffs relinquish all rights to reopen this action and to seek further or different individual or class relief including but not limited to judicial or administrative relief in any pending judicial or administrative proceedings alleging racial discrimination in any employment practices of, or reprisal by, the Department.

C. The parties shall attempt to resolve any and all disputes concerning either the application of or compliance with any provision in this Decree through negotiations. An attempt at informal resolution shall be a prerequisite to either party's seeking relief from the Court for an alleged breach of any provision of this Decree. The following process shall be used by the parties:

1. Either party claiming that a dispute exists regarding any issue under this Decree shall promptly give notice of its claim in writing to counsel for the other party and shall promptly propose a resolution of the issue to the other party.

2. The responding party shall have thirty (30) days following receipt of the written claim to respond, unless this period is enlarged by agreement of the parties.

3. If, after thirty (30) days the party asserting the claim is dissatisfied with the other party's response or resolution, or no response or resolution has been forthcoming, the party asserting the claim may, after providing fourteen (14) days advance written notice to counsel for the other party, petition the Court for appropriate relief.

4. Before the defendant can claim that a dispute exists regarding any issue under this Decree, counsel for defendant must raise the purported dispute with the Director General or with his or her designee, and certify to the Court that the Director General or his or her designee has authorized defendant's counsel to proceed. Before plaintiffs can claim that a dispute exists regarding any

issue under this Decree, all of plaintiffs' counsel must certify that a genuine dispute exists regarding the implementation of this Decree.

D. In the event that changes in the law subsequent to the entry of this Decree make any of its provisions contrary to law either as written or as applied, either party may apply to the Court for a modification of those provisions so that they comply with existing law.

E. Neither the terms of this Decree nor its substance may be offered, taken, construed or introduced as evidence for any purpose or as an admission or statement of wrongdoing by the defendant, either in this action or in any pending or subsequent proceeding of any nature.

F. This Consent Decree comprises the full and exclusive agreement of the parties with respect to the matters discussed herein. No representations or inducements to compromise this action have been made, other than those recited in this Decree.

G. This Consent Decree constitutes a joint Consent Decree and should not be construed against any party.

VI. ATTORNEYS' FEES AND COSTS

A. In full, complete and final satisfaction of any and all claims for costs, including attorneys' and experts' fees incurred by plaintiffs' counsel (including any additional past counsel who may no longer be actively involved in litigating this action) through Preliminary Approval of this Consent Decree, defendant shall pay to plaintiffs' counsel, the total sum of two million, one hundred thousand dollars ($2,100,000). Payments shall be made pursuant to the schedule in Exhibit K.

B. For legal services performed by plaintiffs' counsel after Preliminary Approval, until the expiration of this Consent Decree, defendant shall pay all reasonable attorneys' fees plus expenses and costs as provided by law up

to a maximum amount of one hundred thousand ($100,000) dollars per year.

C. The parties shall attempt in good faith to resolve any disputes concerning attorneys' fees, expenses and costs. Any dispute that cannot be resolved may be submitted to the Court.

VII. *JURISDICTION OF THE COURT*

The Court shall retain jurisdiction for 4 (four) years from the preliminary approval of this Consent Decree solely for the purpose of enforcing the Decree.

VIII. *PROCEDURES GOVERNING FAIRNESS HEARING*

A. The Court has scheduled a Fairness Hearing to be held on July 15, 1996. Exhibit A hereto is a proposed "Notice of Fairness Hearing on Proposed Consent Decree" ("Fairness Notice"), which the parties hereby request that the Court approve and sign.

B. Within 15 (fifteen) days after Preliminary Approval of (1) this Consent Decree and (2) the Fairness Notice, defendant shall send to the last known address of each class member a copy of the Fairness Notice and the Consent Decree. Defendant shall deliver these documents using a method that indicates that the document is unclassified but personnel sensitive and to be reviewed only by the recipient, does not indicate that it concerns this class action, and demonstrates receipt by each class member.

1. Delivery shall be by State Department internal mail for:

a. class members in the Foreign Service assigned to State Department positions in the United States;

b. class members separated from the Foreign Service but employed by the Department of State in a Civil Service or contractor position.

2. Accompanying the documents delivered under subparagraph 1 above will be an "Acknowledgment of Receipt" and a pre-addressed envelope to send the confirmation of receipt back to the originating office. The envelope shall be marked "Unclassified. Personnel Sensitive. To be opened by addressee only."

3. Delivery shall be via U.S. registered or certified mail, return receipt requested for:

a. class members in the Foreign Service assigned to non-State Department positions in the United States, at the contact address (either office or residence) provided by each individual to their career development officer;

b. class members who have separated from the Foreign Service but who do not work for the Department in another capacity and whose last known address is in the United States.

4. The envelope transmitting the documents shall be marked "Unclassified. Personnel Sensitive. To be opened by addressee only."

5. Delivery shall be via U.S. Department of State pouch for class members in the Foreign Service assigned to United States Government facilities overseas, via registered item in the diplomatic pouch if pouch delivery can be effectuated via regularly scheduled pouch service in two weeks.

6. The documents delivered shall be placed inside two sealed envelopes, the outer one addressed to the administrative/personnel officer of the Post. Inside the addressed envelope will be a message from the Director General's office directing that the inner sealed envelope be delivered unopened to its addressee and that a confirming cable be sent to Washington.

7. Delivery shall be made using the United States Government's contract commercial courier for:

a. class members in the Foreign Service assigned to United States Government faciltities overseas which the pounch will not reach within two weeks;

b. class members in the Foreign Service assigned to non-United States Government facilities overseas at the contact address (whether it be office or residence);

c. class members who have separated from the Foreign Service whose last known address is outside the United States.

8. The documents delivered shall be placed inside two sealed envelopes; the outer envelope with the class member's name and address. Inside the outer envelope will be a message from the Director General's office directing that the inner sealed envelope be delivered unopened to its addressee and that a confirming cable be sent to Washington. The contract commercial courier will obtain a signature at the address to which the package is delivered, and the Department will request confirmation of all deliveries.

a. Class members in a Leave Without Pay (LWOP) status will be contacted at the address left with their career development officer using a method from those listed above which best conforms to their location.

b. If a class member is located in a country in which delivery by United States Government diplomatic pouch or commercial courier is not feasible, alternate arrangements will be made subject to agreement with the counsel for plaintiffs.

C. Within 15 (fifteen) days of the date that defendant sends this Consent Decree and the Fairness Notice to the class members, defendant shall provide plaintiffs' counsel with the current mailing addresses to all class members who are still in the Foreign Service and the last known home address of class members who are no longer in the Foreign Service.

D. Within 30 (thirty) days of the date that defendant sends this Consent Decree and Fairness Notice to the class members, defendant shall provide plaintiffs' counsel with the names of all class members with respect to whom it has received a receipt or cable confirming their receipt of this Decree and Fairness Notice. The parties shall consult at that time regarding arrangements for delivery of the Decree and Fairness Notice to any class members who have not received it.

E. In accord with Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n), notice shall be provided to all Foreign Service Officers and career candidates employed by the State Department as of Preliminary Approval that this Consent Decree might adversely affect their interests and legal rights and apprising them that they will have an opportunity to present objections to the Consent Decree at the Fairness Hearing scheduled pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Following the Preliminary Approval of this Consent Decree, and at least 45 (forty-five) days before the Fairness Hearing, defendant will issue a Department Notice and an ALDAC cable informing all Foreign Service officer generalists and career candidates of the terms of the proposed Consent Decree, its Preliminary Approval and the procedures for filing objections to the Consent Decree and for participating in the Fairness Hearing. Plaintiffs' counsel will be given an opportunity to review this notice prior to its issuance.

F. Any person who wishes to object to the terms of this Consent Decree will be required, not less than 30 (thirty) days prior to the Fairness Hearing, to submit a written statement to the Court, with copies to defendant's counsel and to plaintiffs' counsel. The statement shall contain the individual's name, address and telephone number, along with a statement of his or her objection(s) to the Consent Decree and the reason(s) for the objection(s).

G. Counsel for the parties shall jointly use their best efforts to obtain prompt judicial approval of this Consent Decree. The parties have bargained for the terms in this Consent Decree. No section or subsection of this Consent Decree may be modified or stricken. If the Court does not approve this Consent Decree as written, the entire Consent Decree is null and void.

H. Within 60 (sixty) days of Final Approval of this Consent Decree, defendant shall deliver the appropriate check disbursement requests to the General Accounting Office to enable checks to be issued payable to class members in the amounts determined under this Consent Decree. Upon receipt of the checks, defendant's counsel shall distribute them at defendant's expense. Prior to delivery of the checks, plaintiffs' counsel shall verify that the amount of money to be delivered to each class member is accurate.

/s/ Carl E. Anderson (by WEC)
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EXHIBIT F—DISTRIBUTION OF MONETARY AND OTHER RELIEF

This Exhibit describes how the relief referenced in Section IV of the Consent Decree will be distributed eligible class members.

I. MONETARY AWARDS TO PLAINTIFFS AND PLAINTIFF/INTERVENORS

Individual awards will be made in recognition of the plaintiffs' efforts which have contributed to the successful resolution of the class action. A total of $125,000 (one hundred twenty five thousand) will be distributed in the manner set forth below.

A. An award of $40,000 (forty thousand) will be made to Walter J. Thomas as compensation for his leadership and coordinating role on behalf of the class.

B. An award of $85,000 (eighty-five thousand) will be divided equally among the remaining 29 (twenty-nine) plaintiffs and plaintiff/intervenors (or their estates, if they are deceased) in recognition of their efforts on behalf of the class. Counsel for plaintiffs will provide the Department of State all information necessary to effect payment to any estate of a deceased FSO determined eligible to receive a part of any award under the Consent Decree. Thus, each plaintiff or plaintiff/intervenor other than Walter Thomas will receive 1/29th of $85,000, or $2931.03 (two thousand nine hundred thirty one dollars and three cents) per person.

II. PROMOTION DAMAGES

A total of $2.9 million (two million nine hundred thousand) will be distributed to class members who have alleged that they suffered discrimination manifested in the form of delays in, and denials of, promotions.

A. *Exclusion:* The following class members shall NOT be entitled to "Promotion Damages" determined and distributed under this section:

1. Any class member who attained the personal rank of Career Ambassador or Career Minister.

2. Any class member who served in the position of Ambassador, regardless of personal rank.

3. Any member receiving a promotion under the procedures described in Section IV below.

B. An expert selected by counsel for plaintiffs ("the expert"), will select an appropriate comparison group and will determine the median number of months that FSOs in the comparison group remained at grades 4, 3, 2, 1, OC, and MC before receiving a promotion during the period from January 20, 1982 through Preliminary Approval.

C. The expert will determine the actual number of months that each eligible class member remained at those same grades.

D. Each class member will receive one point for every month that s/he remained in grade longer than the median for the comparison group for those grades specified in subsection II(B) above. Points can only be earned for every month of "promotion delay" during the period January 1982 through Preliminary Approval.

E. Thus, the longer a class member remained in grade without receiving a promotion (beyond the median promotion time for the comparison group), the more points s/he will accumulate under the formula.

F. The number of points determined for each eligible class member shall be totaled.

G. The "promotion damages" amount to be awarded to each eligible class member shall be determined as follows:

(i) divide the promotion damages ($2.9 million) by the total class promotion points to determine the dollar value for each promotion point;

(ii) multiply each class member's promotion points times the dollar value per point.

The following example illustrates the distributon of relief for delayed/denied promotions:

Ex. 1

Class member A was in grade 3 from January 1980 until September 1990 and was promoted again, from grade 2 to grade 1, in September 1994. Class member A can accumulate promotions delay points from January 1982 (the beginning of the back pay liability period). Thus, for purposes of damages distribution, A remained in grade 3 for 103 months from 1/82 until promoted in 9/90. Assuming that the median time-in-grade 3 for the comparison group is 53 months, A receives 50 points—one point for every month s/he remained in grade 3 longer than the median for the comparison group.

A remained in grade 2 for 48 months from 9/90 to 9/94. Assuming that the median time-in-grade 2 for the comparison group is 48.7 months, class member A would not accumulate promotions points for grade 2 because s/he promoted at or faster than the median for the comparison group.

To calculate the dollar value to class member A: assume that 6,000 is the total number of months that all class members were delayed/denied promotions. To determine the dollar value per point, divide $2.9 million by 6,000, which equals $483.33. Class member A would receive 50 x $483.33=$24,166.67.

III. TERMINATION DAMAGES

The balance of the $3,800,000, which equals $775,000 (seven hundred seventy five thousand), shall be distributed as follows.

A. The $775,000 shall be divided into *Pool A* ($200,000) (two hundred thousand), which shall be distributed by the formula described below, and *Pool B* (575,000) (five hundred seventy five thousand), which may be distributed at the discretion of the "Review Panel." The Panel is described in subsection III(D) below.

B. *Pool A* shall be distributed among class members who left the Foreign Service with a termination code of 304: Retirement—In Lieu of Involuntary Action; 355: Termination—Expiration of Appointment; 356: Termination—Involuntary; or 357: Termination; or who petition the Review Panel within 45 (forty-five) days of the date of Preliminary Approval and establish to the satisfaction of the Review Panel that they left the Foreign Service under circumstances which constitute either an official termination for unsatisfactory performance or a "constructive discharge' 'as that term is defined under the law prevailing in the District of Columbia. The intended meaning of the term constructive discharge is further described in paragraph III(D)(4) below.

1. Each class member who is eligible to receive funds from Pool A shall receive one point for each month after the month of termination or constructive discharge which falls within the period from January 1984 through Preliminary Approval.

2. An expert selected by counsel for plaintiffs shall determine the number of points which each eligible class member shall receive.

3. The total number of points received by all eligible class members shall be totaled.

4. The amount to be awarded to each eligible class member from Pool A shall be determined as follows:

(i) divide Pool A ($200,000) by the total points received by all eligible class members to determine the dollar value for each Pool A point;

(ii) multiply each class member's Pool A points times the dollar value per point.

The following examples illustrate distribution of relief under Pool A, using September 1995 as the hypothetical date of Preliminary Approval:

Ex. 2

Class member B was terminated in September 1987 with code 356 ("termination-involuntary") and, therefore, would automatically receive 96 points for the 96 months from the month after the month of termination (10/87) through the end of the damages period (9/95). Assume that 1000 is the number of Pool A points for all class members after termination codes are tabulated and after the Review Panel determines if any additional class members should be included in Pool A. To determine the dollar value per point, divide $200,000 by 1,000, which equals $200. Class member B would receive 96 × $220 = $19,200.

Ex. 3

Class member C resigned in September 1990 with termination code 302 ("voluntary retirement"). Class member C is not automatically eligible for Pool A and must apply to the Review Panel to demonstrate that C's termination was for unsatisfactory performance or that it constituted constructive discharge. If the Review Panel determines that class member C is eligible for Pool A termination points, C would receive 60 points for the 60 months from the month

after the month of ."voluntary retirement" (10/90) through the end of the damages period (9/95). Assuming that C's 60 points were included in the 1,000 points used in example 2, class member C would receive 60 x $200=$12,000. If the Review Panel determines that C is not eligible for Pool A, class member C would not receive termination damages.

Ex. 4

Class member D was designated for selection out for relative performance but resigned in September 1988 prior to the effective date of the selection out. Because class member D terminated with code 317, D is not automatically eligible for Pool A. D would become eligible for Pool A if s/he applies to the Review Panel and the Panel determines that the termination was for relative performance. If eligible, D would receive 84 points (100/88-9/95 & $200= $16,800.

C. *Pool B* ($575,000) shall be distributed in the manner described below.

1. *Pool B* funds may be distributed, at the discretion of the Review Panel, to a maximum of four individuals who must be selected from among those class members who are eligible to receive funds from Pool A.

2. Class members eligible to participate in Pool A by virtue of their termination codes or who petition to participate in Pool A must separately petition the Review Panel within 45 (forty-five) days from the date of preliminary approval of the settlement in order to be eligible for a share of the Pool B funds.

3. The Review Panel will consider all relevant factors, including the following, in determining whether to distribute funds from Pool B, and in what amounts, to eligible class members:

a. evidence of the severity of the alleged discrimination suffered which contributed to the class member's termination or constructive discharge;

b. evidence of the degree of economic hardship suffered by the class member since s/he left the State Department;

c. evidence of mitigation efforts since leaving the State Department, including evidence of efforts to obtain employment and income earned since leaving the Department;

d. evidence of the likelihood of future economic hardship.

4. The Review Panel may not award more than $250,000 from Pool B to any eligible class member.

5. The Review Panel shall make any determinations of discretionary distributions to be made from Pool B within 66 (sixty-six) days of the date of the preliminary approval of the settlement.

6. The Review Panel has no obligation to determine that any or all of the funds in Pool B should be distributed. Any amount remaining in Pool B after the Panel completes its consideration of applications for distributions from Pool B shall be returned to Pool A and distributed according to the procedures described in subsection III

The following examples illustrate possible damage distributions from the funds in Pool B:

Ex. 5

Class member B (from example #2 above) was terminated with code 356 and automatically included in Pool A. Along with 15 other eligible class members, B petitions the Review Panel for an award from Pool B. The Panel determines that B will not receive an award. Thus, B's termination award remains $19,200 from Pool A.

Ex. 6

Class member C (for example #3 above) is not automatically included in Pool A because C's termination code is 302. If C asks the Panel to be found eligible to receive Pool A funds, but the Panel determines that C is also not eligible for Pool B.

However, if the Review Panel determines that class member C is eligible for Pool A, C may apply to the Panel for a Pool B award. Assume that the Panel determines that class member C should receive $50,000 from Pool B. C's total award for damages related to termination would be $50,000 + $12,000= $62,00.

Ex. 7

Class member D (from example #4 above) is eligible for Pool A due to the Panel's determination that D was terminated for relative performance. The Panel also determines that D's termination and evidence of subsequent circumstances merit the maximum award from Pool B—$250,000. Thus, D's total award for damages related to termination would be $250,000 + $16,800=$266,800.

D. *The Review Panel*

1. *Jurisdiction of the Panel*

a. Class members who converted, retired, resigned, or who left the Foreign Service with termination codes other than those identified in subsection III(B) above are not automatically eligible to receive any portion of the Pool A amount.

b. However, class members may present the facts of their terminations to a Review Panel which will determine whether their departures constituted "constructive dis-

charge" under the controlling law in the District of Columbia.

c. If the Panel finds that a class member was terminated for unsatisfactory performance or was constructively discharged, s/he will receive points in Pool A in the same manner is described in paragraph III(B)(1) above.

2. *Composition of the Panel*

a. The Review Panel will consist of three members: one chosen by the plaintiffs, one chosen by plaintiffs' counsel, and the third agreed upon by the first two members. No class member who is eligible for monetary relief under this Decree and no counsel for any class member may serve on the Panel. If requested, the State Department will provide reasonable assistance to the Review Panel by putting it in contact with persons knowledgeable about the personnel practices of the State Department.

b. Panel members will be compensated by the United States at the rate of no more than $75 (seventy-five) per hour for their service. In no event shall the compensation paid to any panel member exceed $10,000 (ten thousand). Plaintiffs' counsel will provide administrative and secretarial support for the Review Panel.

3. *Review Panel Procedures*

a. Class members who seek inclusion in Pool A or Pool B will have 45 (forty-five) days from the date of the preliminary approval of the settlement to petition the Panel for review. Petitions to the Panel must be in writing.

b. An oral hearing, if requested, will be held at the discretion of the Review Panel.

c. The Panel shall be granted access to reasonable terms and conditions to any non-privileged State Department files pertaining to any matter properly before it.

d. Except for final decisions, the deliberations of the Review Panel shall be confidential. All decisions required of the Review Panel will be rendered within 66 (sixty-six) days of the date of the preliminary approval of the settlement, and all decisions will be final and unreviewable in any forum except in this Court as part of the Fairness Hearing and in any appeal of the decision by the Court following the Fairness Hearing. The Review Panel will issue a short written decision but will not draft an opinion in support of its decision.

4. *Determinations of Constructive Discharge*

a. The deliberations of the Review Panel will be guided by the principles of constructive discharge in the District of Columbia as set forth in *Clark v. Marsh,* 665 F.2d 1168, 1174 (D.C. Cir. 1981) and reaffirmed in *Dashnaw v. Pena,* 12 F.3d 1112 (D.C. Cir), *cert. denied* ——U.S. ——, 115 S.Ct. 417 (1994).

b. In order to establish constructive discharge in a case involving a claim of alleged discrimination, a plaintiff must prove not only intentonal discrimination, but also must demonstrate the existence of "aggravating factors" which would force a reasonable employee to resign under similar circumstances. *Dashnaw*, 12 F.3d at 1115.

c. The "aggravating factors" identified by the court in *Clark v. Marsh* included "a continuous pattern of disfers, and training—despite the plaintiff's vigorous pursuit fers, and training—despite the plaintiff's vgorous pursuit of those opportunities. *Id.* at 1174.

d. In other words, a constructive discharge occurs when the employer tolerates discriminatory working conditions so difficult or unpleasant that a reasonable person in the employee's position would be forced to resign. *Hopkins v. Price Waterhouse,* 825 F.2d 458, 472-73

(D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989).

e. In *Hopkins*, the court stressed that the "mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge . . . [because] discrimination is still best attacked within the context of existing employment relations." *Hopkins*, 825 F.2d at 473.

f. Additional procedural guidelines and instructions will be provided to the Review Panel by plaintiffs' counsel and the Panel shall adhere to these guidelines and instructions. Claim forms and instructions for submissions to the Panel will be distributed with the Fairness Notice and Consent Decree within 15 days after preliminary approval of the Consent Decree. All point determinations which are required by this Exhibit shall be subject to review and approval by plaintiffs' counsel before damage awards are made to class members. All other determinations required by this Exhibit shall be subject to review by plaintiffs' counsel before awards are made to class members.

IV PROMOTIONS

Paragraph IV(B)(1) of the Consent Decree provides for 17 (seventeen) promotions to be awarded to class members who were recommended for promotion but not reached during the period between January 20, 1984 and the date of Preliminary Court Approval of the Consent Decree.

An expert selected by counsel for plaintiffs shall identify, according to the procedures described below, the 17 class members who will receive promotions. Those promotion determinations shall be subject to review and approval by plaintiffs' counsel before the promotions are made to class members. The State Department and plaintiffs' counsel shall hold such discussions and disclose such information

as are necessary to verify that the promotions were made according to the methodology described in this Section.

All promotions shall be awarded to class members currently serving as Foreign Service Officers. Those class members receiving promotions under this Section will not receive promotion damages under Section II above. Salaries of class members receiving the 17 promotions will be adjusted prospectively to reflect the promotions and step increases.

A class member who is awarded a promotion pursuant to the consent decree may decline the promotion and may elect to receive promotion delay damages according to the procedures described in Section II. If a person declines a promotion, the next person on the list shall be offered a promotion until a total of 17 persons accept promotions.

A. *Mid-level Promotions*

The 16 (sixteen) mid-level promotions will be awarded to class members currently at a grade where they have been recommended for promotion but not reached. These promotions will be awarded to class members who have been at their present grade the longest period of time. To distinguish between class members with identical periods of time at the grade from which they were recommended but not reached, promotions will be made to class members with multiple recommendations for promoton at that grade. If further differentiation becomes neccessary, promotions will be awarded according to rank order on the selection list for any year the class member was recommended for promotion from the grade referenced in the first sentence of this paragraph; i.e., the class member closest to the promotion cut-off in any year at the grade under consideration would receive the promotion.

B. *Senior Foreign Service*

The Consent Decree provides one promotion within the Senior Foreign Service from FE-OC to FE-MC. That promotion will be made to the class member who was recommended for promotion and has been at grade the longest period of time. If more than one class member has been at FE-OC for the identical period of time, the promotion will be made to the class member first recommended for promotion and then to the class member ranked highest on the selection board list for any year the class member was recommended for promotion to FE-MC by the selection board.

V. REINSTATEMENT

A. The Consent Decree provides for reinstatment of four class members who did not receive tenure. Reinstated individuals will be selected from the "List of Individuals Eligible for Reinstatement" filed under seal as Exhibit J and will receive limited five year appointments at the junior level from which they will have the opportunity to earn tenure.

B. Any individual on the above list desiring reinstatement with the Review Panel within 30 (thirty) days from the date of the Preliminary Approval of the settlement. If four or less than four individuals request reinstatement, then the Panel shall notify the State Department of that fact and the Department shall reinstate all of those individuals.

C. If more than four individuals request reinstatement, then the Panel shall decide which of the individuals shall be reinstated. The Panel shall consider all relevant factors, including the following, in making its reinstatement determinations:

1. evidence that the class member was recommended for tenure by the Commissioning and Tenure Board but

did not receive career status for other reasons, e.g., failure to clear language probation;

2. evidence of the percentage of the recommendations for tenure based on the number of EERS that are officially part of the class member's performance file; and

3. evidence of the time the class member spent in the Foreign Service before being separated.

VI. EXPERTS' FEES

The expert selected by plaintiffs' counsel to calculate damage distributions will be paid the sum of $15,000 (fifteen thousand) by the United States. That sum will be paid within 30 (thirty) days of the date of preliminary approval to plaintiffs' counsel. Defendant shall provide all information reasonably required by the expert to make the calculations required by this Exhibit F.

EXHIBIT G—DISTRIBUTION OF MONETARY RELIEF REMAINING AFTER ALLOCATION PURSUANT TO EXHIBIT F

This provision applies to all funds that the defendant was not able to distribute according to the formula described in Exhibit F.

If any amount remains after the initial distribution under Exhibit F it shall be distributed by plaintiffs' counsel 8 (eight) months after the initial distribution in the same proportion as under Exhibit F to each class member who received any part of the initial distribution. Defendant shall calculate the amount to be distributed to each recipient under this Exhibit and shall provide plaintiffs' counsel with checks drawn in the appropriate amount.

Defendant shall not be required under this provision to distribute an amount less than $100 (one hundred dollars) to any class member. Amounts of less than $100 (one

hundred dollars) that would otherwise have been distributed to individuals shall be included in the sum to be divided among class members whose share of the distribution is equal to or exceeds $100 (one hundred dollars).

EXHIBIT H

Program Direction Positions

DOMESTIC POSITIONS

Executive Secretary (S/S)
Senior Deputy & two deputies in S/S
Deputy Director, Policy Planning Staff (S/P)
Director Operations Center (S/S-O)
Deputy Director Operations Center (S/S-O)
Coordinator, Counter-Terrorism (S/CT)
Associate Coordinator, Counter-Terrorism (S/CT)
Senior Coordinator, Office of the Special Adviser to the Secretary for the New Independent States (S/NIS)
Coordinator, Office of the Special Adviser to the Secretary for the New Independent States (S/NIS) (Note: there are two such positions)
Executive Assistant (S, D, G, P, T, C, E, M only)
Director, Management Planning Office (M/P)
Deputy Spokesperson (PA)
FSI Deans (School of Professional Studies; School of Language Studies; School of Area Studies)
Deputy Assistant Secretary (all)
Executive Director (all)
Deputy Executive Director (all)
Office Director (all)
Deputy Office Director (all)
Country Director (all)
Director, Office of Resources, Plans and Policy (S/RPP)

OVERSEAS POSITIONS

Principal Officer (including Hong Kong, Havana, and Jerusalem)
Deputy Principal Officer (*only* Hong Kong, Havana, and Jerusalem)
Deputy Chief of Mission (including DCM/SEPs and Dep. Reps to IOs other than USUN)

Deputy Coordinator, US Mission to UN, Geneva
Deputy to US Ambassador to UN
Counselor of Mission (class 1 and above only)
Director, American Institute Taiwan
Deputy Director, American Institute Taiwan

Note: reports will include data only on career FSOs whose assignment were *not* subject to Senate confirmation.

COPY WITH NAMES FILED UNDER SEAL

EXHIBIT I

List of Known Class Members

APPENDIX E

List of Individuals Eligible for Reinstatement

COPY WITH NAMES FILED UNDER SEAL

1.	7.
2.	8.
3.	9.
4.	10.
5.	11.
6.	12.

EXHIBIT K

DISTRIBUTION OF ATTORNEYS' AND CONSULTANTS' FEES

Law firm/Consultant	*Settlement Amount of Fees*
Washington Lawyers' Committee	$143,715
Kalijarvi & Chuzi	$31,289
K.L. Kirkland, Consultant	$57,500
Akin, Gump, Strauss, Hauer & Feld	$1,644,099
Walter & Haverfield	$188,843
To be awarded to either Akin Gump or Walter & Haverfield upon court order	$34,554
Total	$2,100,000

EXHIBIT L

THOMAS v. CHRISTOPHER
POOL A CLAIM FORM
(use additional paper if necessary)

1. Name: _____
2. Address: _____
3. Daytime Phone: _____
4. Race: _____
5. Were you a Foreign Service generalist or career candidate at any time since January 20, 1984?

   Yes — No —

6. Were you terminated for alleged unsatisfactory performance?

   Yes — No —

   If yes, what evidence supports your claim?
   (e.g., decisions of the Commisison and Tenure Board or the Performance Standards Board)

   _____

7. If you left "voluntarily," do you claim you were constructively discharged? (*see* part III(D)(4, beginning on page 10 of Exhibit F)

   Yes — No —

   If your answer to number 7 above is yes,

   - Please supply evidence to support your claim and explain how it shows that you were constructively discharged.

- Please note that the constructive discharge criteria explained in part III(D)(4) requires you to demonstrate:
  1. that you suffered *intentional* discriminaiton; and
  2. that aggravating factors led you to resign.
- To establish constructive discharge, you must provide persuasive evidence to establish both elements of your constructive discharge claim.

8. Termination Date From State Department: ———

9. Have you submitted additional materials to support your Pool A claim? Yes — No —
   - Please note that claims that are not supported by additional documentary evidence are unlikely to be found persuasive by the Review Panel.

10. Have you also submitted a claim form for Pool B consideraton? (*see* Exhibit F, pp. 6-7)

    Yes — No —

EXHIBIT L

THOMAS v. CHRISTOPHER
POOL B CLAIM FORM

NOTE: YOU ARE ELIGIBLE FOR POOL B CONSIDERATION ONLY IF YOU ARE INCLUDED IN POOL A DUE TO (1) YOUR TERMINATION CODE OR (2) THE DETERMINATION OF THE REVIEW PANEL THAT YOU WERE TERMINATED FOR UNSATISFACTORY PERFORMANCE OR WERE CONSTRUCTIVELY DISCHARGED.

1. Name: _____
2. Adress: _____
3. Daytime Phone: _____
4. Circle the basis of your eligibility for *Pool A*.
   a. I was terminated with code 304, 355, 356, 357. (circle one)
   b. I was terminated for alleged unsatisfactory performance and have filed application with Review Panel.
   c. I was constructively discharged and have filed application with Review Panel.
5. On the attached sheet, please summarize the reasons why you are entitled to an award from Pool B.
6. Have you submitted materials other than the attached summary sheet to support your Pool B claim?

   Yes — No —

   • Please note that claims that are not supported by additional documentary evidence are unlikely to be found persuasive by the Review Panel.

- **In considering the materials you will submit in support of your Pool B claim, please refer to part III(C)(3), beginning on page 7 of Exhibit F of the Consent Decree, for a partial list of the factors the Review Panel will consider in making Pool B determinations.**

THOMAS v. CHRISTOPHER
POOL B CLAIM SUMMARY

THOMAS v. CHRISTOPHER
REINSTATEMENT APPLICATION
(use additional paper if necessary)

1. Name: _____
2. Address: _____
3. Daytime Phone: _____
4. Date you were separated from the Foreign Service for failure to obtain tenure.
5. Please explain why you are entitled to reinstatement. Include appropriate documentation with your explanation. The Panel will consider all relevant factors including the following:

   - evidence that the applicant was recommended for tenure by a Commissioning and Tenure Board but did not receive career status for other reasons;
   - evidence of the percentage of recommendations for tenure based on the number of EERs that are officially part of the applicant's performance file;
   - evidence of the time the applicant spent in the Foreign Service before being separated;
   - evidence of the applicant's work experience since separating from the Foreign Service that would be relevant to success in the Service if the applicant were reinstated.

6. Have you submitted materials other than your explanation to support your reinstatement application?

   Yes ____ No ____

- Applications that are not supported by additional documentary evidence are unlikely to be found persuasive by the Review Panel.

7. I AM NOT INTERESTED IN REINSTATEMENT INTO THE FOREIGN SERVICE.

_____ _____

(Signature) (Date)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CA 86-2850

WALTER THOMAS,
Plaintiff,

vs.

JAMES BAKER,
Defendant.

Washington, D.C.
July 15, 1996

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE

* * * *

[12] With that, Your Honor, I would like to call Mr. Kirkland as a witness to address the nature and extent of the prospective relief in the consent decree.

KERRY KIRKLAND, PLAINTIFFS' WITNESS,
SWORN DIRECT EXAMINATION

BY MR. SELLERS:

Q. Mr. Kirkland, would you state your full name please.
A. Kerry Dell Kirkland.
Q. And where do you live?
A. 267 Kurtz Avenue, York, Pennsylvania.

Q. What is the highest level of education you have received?

A. I have a Master's of Human Service Degree from Lincoln University.

Q. What has been the nature of your business, Mr. Kirkland?

A. I provided consultations to state and local governments as well as the private sector for the past 20 years in the area of affirmative action, contract compliance and minority business development.

Q. Have you been involved as well with any state agencies?

A. Yes. I've worked for the past 15 years for a variety of state agencies in the area of affirmative action in the Commonwealth of Pennsylvania.

* * * *

[19] MR. SELLERS: Your Honor, I have no further questions of Mr. Kirkland.

THE COURT: All right.

MR. BIRCH: No questions, Your Honor.

THE COURT: Do you have any questions?

Ms. HUTCHINSON: Yes, I do.

MR. SELLERS: Mr. Connelly I think was going to address the retroactive relief. If Ms. Hutchinson has questions of Mr. Kirkland, perhaps she should ask them.

THE COURT: All right. Go ahead.

CROSS-EXAMINATION

BY MS. HUTCHINSON:

Q. Mr. Kirkland, you said that your background was in—you have a consulting firm on diversity programs; is that correct?

A. Yes. I do operate a consulting firm, K.L. Kirkland Consulting. In addition to that, as I mentioned I'm the co-founder and chairmam of the board of the American Contract Compliance Association. And as I mentioned,

the objective of this association is to train affirmative action professional both in the private and public sector which we have done in 42 states in the country, as well as three provinces of Canada, Zimbabwe and South Africa.

* * * *

[21] Q. Okay. And in terms of the work that Mr. Thomas requested you to do, what did they ask you to do?

A. Mr. Thomas asked me to analyze the State Department's current personnel policies as it relates to Equal Employment Opportunity. He asked me to basically engage in the development of proposals and counter proposals to address EEO concerns within the Department and to provide ongoing expert advice as to whether or not the negotiated items as it relates to prospective relief was appropriate.

Q. Okay. And in terms of the personnel policies that you looked at, what areas of the personnel policy did you look at?

A. I looked at everything from the affirmative action plan. I looked at the recruitment initiatives, their many, many reports that was basically designed to indicate the manor in which EEO was carrying out in the personnel system in the Department of State.

Q. So you looked at to see what the Department's track record was in terms of—

A. Yes.

Q. —minorities and their progress in their system?

A. Yes.

Q. Okay. Did you look at their promotion procedures?

A. Not explicitly, no.

Q. Did you look at their assignment bid system at all?

[22] A. No, not explicitly, no.

Q. Okay. Did you try to determine what barriers might exist in the system to the progress of minorities?

A. To a degree. In terms of looking at the composition and the structure of those systems, I did.

Q. When you say the composition or structure, are you talking about the actual way the offices or divisions are structured?

A. I'm talking about the way in which the EEO aspects of their personnel systems was monitored.

Q. So you basically were looking at how the Department monitored the progress and status and placement of minorities in the workforce?

A. That's correct.

Q. Okay. So in terms of the job analysis that you testified that you had done, what did that entail?

A. I did not conduct job analysis. What we did was recommend. It was part of the negotiations that a job analysis be conducted by the Department of State.

Q. But you didn't review any documents to—

A. I did not review any documents in that regard. I think the issue was whether or not there was objective criteria being used with that evaluation report system that was engaged. And I think the conversation hinged upon whether or not there were other ways of looking at a more fair and more [23] objective way of implementing the employee evaluation reports.

Q. And what was your conclusion concerning the current job analysis system?

A. Well, my conclusion was basically that any way of excluding subjective criteria was good. And I think that just the elimination of some of the information on the forms, reducing it from the five block format to the two block format was good in my opinion.

Q. So did you have an opinion as to whether or not the evaluation system that's currently being used was subjective?

A. I didn't really get into any details regarding that issue. I just basically reiterated to the fact that less was best in this particular case, because number one, we looked at whether or not the individual would, in fact, be recommended for promotion, and if not, why not, with more objective criteria.

Q. Now, did you conduct any surveys with employees currently employed with the Department in trying to come up with these solutions?

A. No one other than the plaintiff group that I've been working with over the past two years.

Q. And in terms of the plaintiff group, once the prospective relief had been designed, did you take it back to them to have them review it?

A. Absolutely.

[24] Q. And did they give you a response to what you had presented?

A. Yes, absolutely.

Q. Can you tell me what that response was?

A. As I recall, I think the areas of concern was surrounding the length of time that the consent decree would be monitored. I think there was some discussions regarding four years as opposed to four years. And I think there was another issue if I can recall regarding the sanctioning of individuals as it relates to anyone who would not comply with the consent decree.

Q. Did they tell you that this evaluation report that you had designed or recommended was acceptable to them?

A. Conversely there was no dialogue indicating unacceptability.

Q. So that because they didn't express a concern to you, you determined that they had accepted it?

A. That's correct.

Q. Do you know if they expressed any concern to their attorneys?

A. I'm not aware of that.

Q. Okay. So that basically because you didn't hear back from them, you concluded that it was acceptable to them?

A. During the course of our discussions surrounding the development of the proposals and counter proposals, I have not [25] heard any concern mentioned to me or the attorneys for that matter during that process.

Q. So once you finished your recommendations, were you involved in the actual discussions between the attorneys and the plaintiffs concerning their acceptance of these proposals?

A. I was.

Q. So you met with both the plaintiffs and their attorneys concerning the acceptance of the proposals?

A. I met with the plaintiffs and their attorneys and also negotiated with the defendants regarding these issues.

Q. Did you meet with the plaintiffs and their attorneys at the same time they met with their attorneys concerning the acceptance of these proposals?

A. If you're speaking of yourself, no, I have not.

Q. Okay. I'm speaking of you and these attorneys and the plaintiffs concerning the—

A. Yes, I have.

Q. —acceptance of the prospective relief?

A. Absolutely.

Q. And at that meeting, did the plaintiffs accept the prospective relief?

A. At that meeting it was my understanding that there were some minor, minor issues that I thought I appropriately addressed.

* * * *

[93] MS. HUTCHINSON: If, in fact, my questions don't—I don't feel they're resolved, you know, can I do something written?

THE COURT: Yes. Now, let's see how we want to handle this. We've got two lists here, against and favor, and one neutral, three lists. Now, should I just call these people or do you want to present people? How do you want to handle it?

MS. HUTCHINSON: I think just calling the witnesses.

THE COURT: All right. Just call the people then. Start with the opposed list. Madam Clerk, go ahead. Just call them.

THE DEPUTY CLERK: Alan Latimer.

THE COURT: Mr. Latimer, would you prefer to sit in the witness chair?

MR. LATIMER: I prefer to sit in the witness chair please.

THE COURT: All right. Well, then we'll swear you and put you in the witness chair. Pleased to have you here.

ALAN LATIMER, SWORN

THE WITNESS: Can you turn the microphone up? There are some people who can't hear behind the glass.

THE COURT: I don't know if you know there was a stabbing in the courthouse today, so that might show you why that's necessary.

* * * *

[113] THE COURT: And then that gets wiped out if this case goes—

MS. HUTCHINSON: His complaint would be gone.

THE COURT: But I assume if you don't opt in, then you—this will not touch his complaint I assume if he opts out? Even under your theory, Mr. Birch.

MR. BIRCH:: If you allow him to opt out, then he would proceed with his individual claim.

THE COURT: And I assume that is what you want to do?

THE WITNESS: That is exactly what I plan to do.

THE COURT: Okay.

MS. HUTCHINSON: That's all I have.

THE COURT: Anything further?

THE WITNESS: No, sir. I would just like to point out that the plaintiff intervenors have consistently rejected this proposal. It is not fair. It does not deal with the systemic discriminatory practices in the areas of promotion assignments and selection out. And if the Court doesn't craft or have some input into devising a system that is fairer, then I really don't understand what we're doing here, sir.

THE COURT: Well, again,—
THE WITNESS: With all due respect.

* * * *

[144] DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Would you state your name for the record please.
A. Yes, my name is Ray Robinson.
Q. And Mr. Robinson, in terms of this current consent decree, what—how will it affect your status as a Foreign Service Officer currently today? What effect will it have?
A. Well, it will insure that I will be separated from the Foreign Service in little over two months.
Q. And why is that?
A. Because the consent decree is extremely flawed, and it does not allow me as one of the original plaintiffs and one of the plaintiff intervenors to compete for the 17 promotions that were offered in the consent decree.
Q. And what would be your next level of promotion if you received a promotion?
A. I would go from OC to MC, which is within the Senior Foreign Service.
Q. And the consent decree will prevent you from having any eligibility for the promotions that are outlined in the decree?
A. That is correct.
Q. And your last date of employment will be when?
A. I will be separated on the 27th of September.
THE COURT: After how many years?
[145] THE WITNESS: Twenty years, sir.
THE COURT: Would you be eligible for anything, a—
THE WITNESS: They offered me something like $31,000, Your Honor.
THE COURT: As a buy-out?

THE WITNESS: Oh, no, no. This is in the consent decree.

THE COURT: I mean, will you be able to retire?

THE WITNESS: Oh, yes, I'm retirement eligible.

THE COURT: You are retirement eligible?

THE WITNESS: Yes.

THE COURT: And so the reason that you'll not get another assignment is because you haven't been selected for a Foreign Service position; is that it?

THE WITNESS: I wasn't promoted within the seven year time frame, but this I contend was because of the discrimination against me, and I have three unsettled EEO complaints, plus a grievance to this offense.

THE COURT: Now, your position on this decree is you will opt out?

THE WITNESS: Absolutely.

THE COURT: And bring a lawsuit?

THE WITNESS: Absolutely. Well, I don't have to bring. I would want to continue with those I have on-going. I filed one in 1986, one in 1987,—

[146] THE COURT: These are lawsuits?

THE WITNESS: These are EEOC complaints.

THE COURT: Which have not been resolved?

THE WITNESS: Which have not been resolved. And then I filed another one in 1994.

THE COURT: If they resolve against you, there will be a lawsuit I assume?

THE WITNESS: I didn't understand?

THE COURT: If you get a decision against you, you'll go to the next step?

THE WITNESS: If this consent decree is approved, which I really hope it is not, then I will be forced to—you know, I've indicated on several occasions I will opt out. Then I have to come as I understand it back before you.

THE COURT: But I think if there is an administrative—you have to exhaust your administrative remedies, I would assume. Isn't that your position, Mr. Birch?

MR. BIRCH: I think, Judge, he has two Title VII administrative complaints and one grievance pending. At least the Title VII complaints have been pending for more than 180 days, so he would have the option, he would either go through the administrative process—

MS. HUTCHINSON: Well, Your Honor,—

MR. BIRCH: If I may finish, please, Ms. Hutchinson.

[147] THE COURT: Go ahead. So in other words, you have to get a lawyer. That's what you got to do.

THE WITNESS: Well, Mr. Birch is in error. I have three complaints.

MR. BIRCH: I was going to say before Ms. Hutchinson interrupted me, the third is a grievance.

THE COURT: But the point is you're going to have to —look, we can't give you legal advice. You're going to have to get your own lawyer.

THE WITNESS: Well, I have a lawyer right now.

MS. HUTCHINSON: Your Honor, the problem about having these individuals such as Mr. Robinson who is also a plaintiff in this action start all over again is his complaints were held up not because he requested it, but because that was part of the agreement in this lawsuit. So to just say he goes out and has to start all over again—

THE COURT: Well, that's assuming—okay. I understand that.

MS. HUTCHINSON: You make a deal and hold up somebody's cases because you want to do something else, and then tell them, well, no, you start back at the beginning. I don't know that—

THE COURT: Well, wait. Let's be fair. The government I assume they only got in the settlement because both sides wanted to settle it. Thank you very much.

[148] THE WITNESS: Oh, no, I have a prepared statement. I have much—

THE COURT: Well, how long is the statement?

THE WITNESS: Well, it will take about five minutes to read, but, you know, my life is—

THE COURT: All right. Let's go.

THE WITNESS: Because I had several other things to talk about with respect to how it impacts me. It impacts me and will put me in the street within two and a half months. For me personally, it did not allow me to compete for the 17 promotions because this caveat that was included in there in the consent decree stated that you had to have been recommended for promotion.

Given the discrimination I've been subjected to, you know, my file is not strong enough to do that. And I've indicated in my written statements why this is overall a bad consent decree for both plaintiffs and putative class members, and I can run through that very quickly.

THE COURT: Go ahead.

THE WITNESS: The first is the prospective relief is totally inadequate to prevent the Department from continuing its racially discriminatory practices against black officers. The decree attempts to prevent plaintiff intervenors from pursuing the appropriate relief for which they are entitled to under the law.

[149] The decree actually punishes and penalizes plaintiffs and individuals who have been damaged by discrimination because it eliminates these individuals from eligibility for retroactive promotions. This is accomplished by requiring that they be recommended for promotion. Because of discrimination and retaliation in the preparation of otheir evaluation reports, the personal files of this group of black officers were not sufficiently strong for them to be recommended for promotion.

Only 17 retroactive promotions are offered when the plaintiffs' statistician calculated a promotion shortfall of 37. And let me interject a point here. Mr. Birch talked at length about their—his statistician. Now, Akin Gump has paid several hundred of thousands of dollars to an excellent statistician in Miami, and she's not here. And those statistics show, you know, they're 180 degrees in opposition to those of Mr. Birch. Why is Akin and Gump or

why did they not bring this statistician here? That would have given you a completely different point of view.

Her calculations indicated there was a shortfall of 37 promotions. It showed the necessity for cascading into the Senior Foreign Service. These are things that were provided for in the Palmer suit, and they're not in this suit.

The decree does not provide for retirees having their annuities adjusted for loss or delay of promotions which [150] was provided for in Palmer. This decree does not provide for the reinstatement of tenured black officers. They just told Mr. Thomas, I'm not going to reinstate you, and there's nothing you can do about it. And there was no promise for pay in lieu of reinstatement, none. They just said, we did it. It was probably wrong, but you're not going to get anything.

The decree only allows for four black officers to be reinstated because of legally being refused tenure, and you went into the fairly in depth. The retroactive monetary settlement amounts are not based on necessary calculations and may well not be adequate. The individual claims of plaintiffs and putative class members were not calculated to arrive at the settlement figure.

And if you'll just give me one or two more seconds, I'd just like to talk about our representation or more accurately put, our lack of representation by Akin and Gump and the Lawyers' Committee. The plaintiffs have signed retainer agreements with these law firms that state that no agreements can be reached without a majority vote of the plaintiffs. The plaintiffs rejected the consent decree by a vote of 20 to 7 on at least two occasions.

This is a matter of Court record. Then these two firms suddenly stated that they were now class counsel for the putative class members. The Court consented to let the [151] putative class members have their say about the decree via comment and vote. They have voted, Your Honor, to reject, I repeat, reject by a margin of 2 to 1.

And I understand that there were some questions about Akin and Gump's behavior and actions in soliciting some 28 approval votes. This is also a matter of Court record. I am now astounded to find out that Akin and Gump still wants the Court to approve the consent decree as being fair.

May I ask the Court, sir, who does Akin and Gump now represent? Themselves? The consent decree itself? Because the plaintiffs and the putative class have voted to reject the decree. Akin and Gump and the Washington Lawyers' Committee are counsel without clients. I cannot understand how or why they are still trying to force a grossly unfair and flawed consent decree on putative class members and plaintiffs who vehemently oppose it.

I understand that Akin and Gump have now indicated that by not voting or expressing a written opinion, putative class members are de facto giving support for the decree. The reasoning which is also flawed is that the consent decree package did not specifically solicit a vote. This is preposterous. Akin and Gump helped to cleverely word the decree papers not to solicit a vote, but the class voted anyway to reject.

I have personally, sir, been in contact with over [152] 200 of former and current black FSO's, well over 100 in person and by phone. They overwhelmingly stated to me that the decree is unfair and should be rejected. However, many feel fearful that the Department will retaliate against them if they voted to reject.

Many are also scarced to testify here against the decree because of a fear of reprisal. And, sir, this fear is well founded, because in the past the Department has retaliated against many of the plaintiffs and even putative class members.

Judge Sporkin, this decree in its present form is grossly unfair to the putative class and plaintiffs alike. It is supported only by the Departments of State and Justice and, of course, Akin and Gump and the Washington Lawyers' Committee.

It has been resoundingly rejected by those whom it is supposed to help and defend. Sir, I implore the Court to reject this badly flawed and unfair and unjust decree and place this lawsuit back on the litigation track. I thank you very much for the opportunity to speak.

THE COURT: Let me point out something to you. If this case had gone—if Judge Revercomb were still here, and I assume he would uphold his position that there is no class action here, where would you be then?

THE WITNESS: Just before his death and before you [153] inherited the case, Your Honor, Judge Revercomb indicated that he would entertain the plaintiffs coming back and he'd revisit this.

THE COURT: Well, how many times did he turn it down, twice?

THE WITNESS: Twice. But then when we came back with about 27 or 30 of us, he said he would revisit it, because I don't think he particularly wanted to go through with 28 cases. And with your taking over the case, I think you were trying to get a settlement, and we're again at the point where we're having these same 20 to—

THE COURT: I understand that. But let's assume that he would have again rejected that, said, look, these things have got to be proceeded by—

THE WITNESS: Well, then I would—sir, I've suffered greatly because my cases have been held in abeyance. I would have then pursued my individual cases, and I think I would have won, because I think they're meritorious, and I would be okay.

THE COURT: Which you would still have the right to do if I approve the settlement and give you the right to opt out.

THE WITNESS: Those are several ifs.

THE COURT: Well, I understand what you're saying, though. Okay. Let's get the next—time is running out. [154] THE WITNESS: Thank you very much.

THE DEPUTY CLERK: Cynthia Smoot.

THE COURT: Thank you very much. I do appreciate it.

(Witness excused.)

MARY CYNTHIA SMOOT, SWORN

THE COURT: What is your name?

THE WITNESS: Mary Cynthia Smoot.

THE COURT: And where are you employed?

THE WITNESS: PG County Public Schools.

THE COURT: And when were you employed by the State Department?

THE WITNESS: From March, 1971 through September, 1987.

THE COURT: Did you testify in the preliminary hearing?

THE WITNESS: Yes, I did.

THE COURT: Is there something you would like to tell me? Where do you stand on this consent decree?

THE WITNESS: Oh, I reject it, sir. I've been a part of this plaintiff intervenors for the past 10 years. I was the first female to sign on with the case, and we basically felt at the very beginning that we wanted to do something to improve the conditions for black officers within the Department in terms of assignments, promotions and [155] appraisals, that the appraisals needed to be revised. That was our first concern 10 years ago.

Now, 10 years have elapsed and we feel that because of the time that has elapsed that we have been hurt tremendously, particularly those of us who have been selected out, those that may be facing selection out now because of the ongoing practices within the Department. And we feel that we ought to be fairly compensated, either in terms of promotions, reinstatement, back pay, front pay in lieu of reinstatement for those who have been selected out, because there is a pattern of discrimination within the Department.

THE COURT: Did you ask to be reinstated?

THE WITNESS: Sir, I was not given the opportunity.

THE COURT: You were not given the opportunity.

THE WITNESS: No. I was basically denied reinstatement. I was a tenured officer.

THE COURT: Do you know what you're going to be getting—

THE WITNES: Yes, sir.

THE COURT: What you're going to be getting out of the settlement?

THE WITNESS: Yes.

THE COURT: Is it your position that you opt out?

THE WITNESS: Yes.

THE COURT: Is it your position you'll bring your [156] own lawsuit?

THE WITNESS: Yes.

THE COURT: Do you have something pending now in the State Department?

THE WITNESS: Yes, I do.

THE COURT: And that's been held in abeyance because of this lawsuit?

THE WITNESS: Yes, it has.

THE COURT: Tell me a little bit about your—you were tenured, right?

THE WITNESS: Yes, sir.

THE COURT: And then why were you phased—what was your position when you were—what was your rank when your position was terminated?

THE WITNESS: I was an FSO-4. I was tenured and not given a promotion at the time that I was tenured, which is extremely abnormal. But I'd like to go back just a little before that, sir.

THE COURT: As I recall you had a language issue?

THE WITNESS: No, sir.

THE COURT: It was not the language?

THE WITNESS: No, sir.

THE COURT: Go ahead.

THE WITNESS: First of all, I came in under the EEO program, which meant that I have a five year limited

[157] appointment, and the Department was to keep me in an officer position for the five years, so that I would be competitive. That didn't happen. So I was granted an extension for two and a half years. I was about to be selected out when I met the director of the EEO office. He investigated my case, found out I had not been kept in the officer position. Therefore, the Department did extend my term for two and a half years.

After that, I eventually passed the lateral entry exam and was immediately recommended for selection out. Makes no sense. A few years later I was tenured and what, 12 years later after entry tenured by the State Department in '83, and I was in the—

THE COURT: I thought you said you were tenured and recommended out?

THE WITNESS: I passed the lateral entry exam.

THE COURT: Lateral entry and then you were—

THE WITNESS: Recommended for selection out.

THE COURT: Then what happened?

THE WITNESS—The next step—

THE COURT: You beat that?

THE WITNESS: I beat that.

THE COURT: Based upon a complaint, a grievance or what?

THE WITNESS: I failed an EEO suit. Actually the Department failed to review my file as they were required to [158] do by law at that point. I understand from a former personnel officer that the board met, never opened my file. Someone gave a statement concerning my corridor reputation, and it was voted upon to terminate my employment at that point. My file was not even reviewed.

When I heard this, and I had several people that approached—key people in various positions and that was later overturned. My file was reviewed and I managed to stay in the Department a few years longer. I was tenured in '83. I participated in the mid-level officer program and recommended for selection out again.

I overcame that and was sent to an assignment in Mexico in which I had to file a grievance which I won, and in the process of filing the second grievance for that same two year period, I found out that it would cost another $12,000 to pursue my case. I had spent eight the year before, and at that point I said I agreed to let the Department select me out, because I was basically spending all of my savings fighting the Department.

THE COURT: What are you going to get out of the settlement?

THE WITNESS: Approximately $30,000. One major thing I did not mention, sir.

THE COURT: Is that total?

THE WITNESS: That's total. When we're talking [159] about my having been out of the Department for nine years, having been in the Department for 16 and a half years, eight of those years, including for that 16 years, that 16 and a half years, I had approximately two years training, so if we substract that out of the 16 and a half years. Out of the 14 and a half years that were left, I had eight years over complement, which meant that I was out of cone. I was not in a competitive position, so how could I effectively compete for promotions?

My file is definitely flawed. I was not in a position to compete. And many times I was not even in an officer position. So I'm being penalized.

THE COURT: You say you brought an EEO complaint which is being held up?

THE WITNESS: Yes.

THE COURT: Was that brought—you say you allowed yourself to be selected out, but did you file the complaint after you were selected—

THE WITNESS: No, sir. The complaint is ongoing. The hearings were to resolve that issue one way or the other, and at the cost of $12,000, it just was impossible. Now, what the major reason why I terminated those proceedings were that the office that I was in at the time found out that I was involved in this EEO suit. I came

back to my office one day. I had five reprimands on my desk.

[160] THE COURT: For what?

THE WITNESS: I don't—we're talking nine years ago. I don't remember. But five reprimands in one day, and I mean it was reprisal.

THE COURT: So you're saying you were constructively discharged.

THE WITNESS: Yes.

THE COURT: You know what that means?

THE WITNESS: Yes. I'm not sure. Go ahead and explain, sir. I want to make sure.

THE COURT: That means that you were forced out.

THE WITNESS: I was forced out, sir.

THE COURT: All right. Thank you. Next case. Oh, you got a question you want to ask her? Go ahead.

CROSS-EXAMINATION

BY MS. BUCHANAN:

Q. Good afternoon, Ms. Smoot. You were selected out from the State Department, correct?

A. Yes.

Q. And as someone who was selected out, you were eligible to request consideration for an extra payment from Pool B funds. You're familiar with that concept in the settlement agreement?

A. Yes.

Q. And you did not apply to that panel for the extra funds; is that right?

[161] A. No.

MS. BUCHANAN: Thank you.

THE WITNESS: May I say why?

THE COURT: Surely. You may state anything you want. You know that.

THE WITNESS: I felt this decree or consent decree was a joke, not worth my time. I was not going to give it

any credence by asking for other monies, because I plan to reject it.

THE COURT: Well, $30,000 isn't a joke, is it?

THE WITNESS: It is to me, sir. Statistically we've mentioned that the expert hired by Akin Gump is not here. And a statistical run was done in terms of front pay in lieu of reinstatement, and even at the grade level which I left the Department, if that were possible at that grade level, I would get approximately $800,000.

Now, if we looked at the monies that would be made available because of delays in promotion, for the discrimination in assignments that occurred to me, I would get somewhere between the $800,000 and a little over a million dollars. So the $30,000 or any other amounts of money that I might have received under this consent decree was a joke.

Secondly, it is not fair to the plaintiffs. We were basically excluded from promotions. None of us—I don't think any of us are eligible for promotions under this that [162] originally brought the EEO suit, sir.

THE COURT: Thank you very much. Next.

(Witness excused.)

THE DEPUTY CLERK: Dorothy Watson.

THE COURT: How many more do we have here?

THE DEPUTY CLERK: Under opposed, four more.

THE COURT: Four more?

THE DEPUTY CLERK: I'm not including Ms. Watson.

THE COURT: All right, Ms. Watson.

THE DEPUTY CLERK: Five in favor and one neutral.

THE COURT: How are you, Ms Watson? Good to see you again.

DOROTHY WATSON, SWORN

THE COURT: Ms. Watson, what would you like to tell me?

THE WITNESS: I don't think we have enough time here. I'll tell you some of the things. Where would you like me to begin? When I started with the Foreign Service?

THE COURT: I'm trying to save a little bit of time, because as you can see, we'll be going into night court in a little while. Let me see where we are.

I know you were here at the preliminary hearing. What do you think is the most important thing you would like me to hear?

THE WITNESS: Well, I think number one, the first [163] thing I'm very concerned about is prospective relief, and I feel it's absolutely a boilerplate kind of document. It doesn't really speak to the problems and the issues of black Foreign Service Officers and how the State Department can correct its systemic discriminatory practices. And that is extremely important to me and to future black Foreign Service Officers. That is the main reason why I'm involved in this.

I retire in another year, and all of this certainly is not for my future, but if—I hung into this case since 1985 when I first filed my first complaint and which has never been resolved, continued to be retaliated against simply because I had a corridor reputation, again, another one of those things that you didn't understand, the corridor reputation, because I had the nerve to file—

THE COURT: Who said I didn't understand it?

THE WITNESS: Originally you told me you didn't understand it.

THE COURT: Oh, I didn't?

THE WITNESS: So I filed a complaint. It has never been resolved, and I was retaliated for it with my next assignment, which, by the way was not made through the system, had to be made by the Deputy Director General and when he sent me to my post, which was the Ivory Coast, when I arrived there, it was blatant discrimination.

I was told, we know who you are. We didn't want you [164] for this job, and I quote them verbatim. We had a

man in mind, but now that you're here, we're not going to tolerate any of that discrimination nonsense coming from you.

THE COURT: So you were discriminated more as a woman than as a black?

THE WITNESS: No, no, both. No, it was both.

THE COURT: Are you part of the Palmer suit?

THE WITNESS: Am I part of it? No, I am not—yes, I was part as a woman, yes.

THE COURT: Did you get a settlement out of that suit?

THE WITNESS: Yes, I got what they received of $5,000. They sent me a $5,000 settlement. They never asked me anything one way or the other, except whether or not I was a woman in the Foreign Service and felt that I had been discriminated against, and I said, yes.

THE COURT: Do you think you're being discriminated more for your race than your gender; is that it?

THE WITNESS: Oh, absolutely, absolutely. The kind of discrimination in the State Department is blatant. And it is not something for us to continue to say that it is—it could have been subjective. It is not. It is blatant. It is direct, and it is very painful. When I can tell you some of the painful things that has happened to me as a Foreign Service Officer, this is not something to just say $33,000, [165] which is what they're offering me, is so far as I'm concerned, that's insignificant, irrelevant and immaterial.

THE COURT: You sound like my lawyers that appear every day before me. How many years have you been with the State Department?

THE WITNESS: Since 1980, May 5, 1980.

THE COURT: So you've been there about 16 years?

THE WITNESS: Yes.

THE COURT: And you're ready to leave?

THE WITNESS: Yes, I am leaving because I am going to retire next August.

THE COURT: How could you retire with 16 years?

THE WITNESS: I was in the government before. I came from another agency.

THE COURT: I see. Okay. So you'll have what, total how many years?

THE WITNESS: A total of 23 years altogether.

THE COURT: Okay. And so when you say it's blatant, tell me why you said that.

THE WITNESS: Well, when I was in Uruguay, and the reason I had to file my charge, I was the next ranking officer to head the administrative section. And the administrative officer was leaving, and there was going to be a three month gap between the arriving officer.

During that time, I was to serve as the [166] administrative officer in charge of the section. And I was denied that opportunity by the ambassador, the DCM and the present administrative officer. And they insisted on sending back to Washington at an additional expense per diem, housing, fare and bring down a male to serve—a white male to serve as acting officer rather than to let me serve. And I said to them, if this person arrived, I can assure you that I will file a charge of discrimination against, because they could not give me a reason as to why I was not being allowed to serve as the acting administrative officer.

He arrived on July 4, and on July 5, that Monday I filed a charge that has never been resolved. And a few months after that I had to go for another assignment, and I could not get an assignment because the word was already out at the Department that I was a troublemaker. So when I finally had to call the Director General's Office to complain about this, he assigned me to Abidjan. And all of this information went before me, and then when I arrived there, I was treated in the same manner as they did in Uruguay and I had to file another charge, which is still outstanding and has not been resolved.

I also filed grievances. And the grievances ruled in my favor, but it's like a Catch-22. They rule in your favor, but nothing happens except your file is expunged. So when

your file is expunged of all of your evaluations, that means that you have gaps in your file that when you go before [167] the promotion board, you have nothing to show that you really did anything for one whole year.

So when you have three such gaps in your file, as I have had, it's impossible for me to have a P before my name and be promoted. So my problem is accepting this consent decree that I am not being at all treated in a very fair manner, because no one has considered what has happened to me. You're just saying, here is $33,000 and that's sufficient. And that is not acceptable for me.

THE COURT: Now, how about this other Plan B or Plan C, are you aware of that that they mentioned to the other lady? Could she file for the other plan? She's only eligible for the one?

MS. HUTCHINSON: Yes, she couldn't file for Pool B.

THE COURT: She can't get in the other pool?

MS. HUTCHINSON: No.

THE COURT: All right.

THE WITNESS: My concern is I want whatever I would have received for the promotions that I would receive. I want that amount calculated into my retirement plan.

THE COURT: All right. Now, do you intend to opt out?

THE WITNESS: I intend to opt out if this consent decree is so written in stone as the gentleman has constantly said, and we cannot make any changes to make some kind of [168] consideration for those of us who have worked all these years, for 10 whole years or more on this case, I definitely cannot accept this.

THE COURT: And then you would file your own lawsuit?

THE WITNESS: Absolutely.

THE COURT: All right.

MS. HUTCHINSON: I have a question.

THE COURT: Sure. Go ahead.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Ms. Watson, do you recall attending a meeting concerning the prospective relief and the monitoring aspects of the decree with Mr. Kerry Kirkland during the processing of this settlement agreement?

A. Yes.

Q. Do you recall as a plaintiff whether or not you agreed with or expressed any opinion to Mr. Kirkland about the prospective relief portions of the decree?

A. Yes, I did. That's—this morning when he spoke and said that we had accepted what was presented to us, that's not exactly so. I think that I have spoken to every lawyer, including Mr. Kirkland, involved about the prospective relief, and that this is absolutely very, very weak what is being presented to us. It's a boilerplate kind of relief, and I [169] wanted it to be looked into and to include something that will give the State Department an opportunity to correct the way that they are handling blacks in the Foreign Service and weeding them out and keeping them from moving ahead by putting them through this ridiculuos grievance program that they have.

You file a grievance. You get punished, but nothing happens to the person who put you in that state. I asked him to please let me meet with him. I had five other officers who are presently in the State Department who wanted to bring him up to date as to what prospective relief should be about for Foreign Service Officers at the U.S. Department of State.

You cannot put the same thing in our prospective relief as you would in something for the Labor Department because we have a peculiar operation there. And this was never done. I called him at home twice. I was never—the phone calls were never returned.

THE COURT: Thank you. Next.

(Witness excused.)

THE COURT: Let's take about a 10 minute recess.

(Recess.)

THE COURT: Mr. Thomas, we're going to pass you until the last witness. Is that fair enough? You'll be the clean-up batter?

MR. THOMES: That's fine.

THE COURT: All right. Let's get to the next one. [179] Next witness.

THE DEPUTY CLERK: Walter Thomas.

THE COURT: No, no, no. I just said—

THE DEPUTY CLERK: I'm sorry. Ward Morrow. He's gone.

THE COURT: All right. Next one.

THE DEPUTY CLERK: Alfred Neal, Jr.

ALFRED NEAL, JR., SWORN

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Mr. Neal, can you state your name for the record, and can you tell us how currently will this consent decree affect you in your position with the Department of State.

A. My name is Alfred H. Neal, Jr. Right now I'm in the process of being retired. I'm going to be invountarily separated September 29, 1996. Currently I'm right now in a transitional retirement program set up by the Department of State, and as I said, as of September 29, I'll be involuntarily separated from the service.

I think my counsel had asked if it's possible to have my time extended pending the outcome or the final outcome of the case, but that request was not approved.

Q. Now, what is your current gradeé

A. My current grade is I'm a Foreign Service Officer Class 2.

[171] Q. And are you being selected out because you haven't received a promotion; is that the situation?

A. I'm being selected out because I'm what they call in time in class and I have not been promoted in the requisite number of years. I was last promoted in 1986. And because it's more than 10 years without a promotion, and then I have to leave the service in the up or out system.

Q. In terms of this consent decree, were you one of the individuals who was considered for a promotion?

A. I was not considered for a promoton under this consent decree. I was given information to the effect that I would receive $29,000, and that would be all, and I specifically asked if there was a possibility that I was going to be also promoted. And they said, no, under this consent decree you would not be. You would only receive money and that was all.

Q. Do you have a discrimination complaint pending with the Department?

A. At this point in time, no, I do not.

Q. Okay. Did you file as a plaintiff with this particular lawsuit?

A. I filed as a plaintiff intervenor. It was in 1988, if I'm not correct, while I was serving in Mexico City.

Q. And would you elect to opt out of this consent decree if the Court approved your—

A. As the consent decree is presently structured, yes, I [172] would consent to opt out.

THE COURT: Would you bring a lawsuit?

THE WITNESS: I would bring a lawsuit and I guess I also would have counsel in order to do so. Yes, Your Honor.

THE COURT: How many years have you been in—

THE WITNESS: I've been in the Foreign Service since October 6, 1967.

THE COURT: 19 what?

THE WITNESS: 1967.

THE COURT: You don't look that old.

THE WITNESS: I have a baby face, sir. I have seven children and a baby face.

THE COURT: So you have close to 30 years?

THE WITNESS: Yes.

THE COURT: What was your best assignment?

THE WITNESS: I guess my best assignment was my first one. I was in Ethiopia in 1969. I had left the Peace Corps in '67, and that was my first assignment. I came into the Foreign Service through the Foreign Service JO program, which was trying to attract black officers. And I think I was the third or fourth officer under that program.

* * * *

[224] WALTER THOMAS, SWORN

THE COURT: See, if I had gone down to Jamaica and gotten that accent, I'd probably be in a better position than I'm in now. Go ahead.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Would you state your name for the record please.

A. Yes, I'm Walter Thomas. I reside at 1440 South Joyce Street in Arlington, Virginia.

Q. And Mr. Thomas, during the processing of this particular civil action which led up to this consent decree, did you have occasion to meet with Mr. Kerry Kirkland concerning the prospective relief in this decree?

A. Yes, I have. I have done that.

Q. And during the time period, did there come a time in August, 1995, when you attended a meeting at which Mr. Kirkland and other members of the plaintiffs' counsel were present and plaintiffs were present?

A. Yes, I believe the date was August 8, on the 8th of August, 1995.

MS. HUTCHINSON: Your Honor, I'd like to have this letter marked for identification. I'm sorry we don't have lots of copies.

THE COURT: I've got an appointment I've got to cancel.

[235] (Pause.)

THE COURT: Mark that as what, a Court exhibit?

MS. HUTCHINSON: This is actually plaintiff class, so it would just be—

THE DEPUTY CLERK: Plaintiff Thomas 1.

(Plaintiff Thomas' Exhibit No. 1 marked for identification.)

THE COURT: You're going into night court now. You know that.

THE WITNESS: Your Honor, I think that was the last question or did you have—

BY MS. HUTCHINSON:

Q. I want you to identify this particular letter and then we have one more question as soon as these gentlemen take a look at it.

THE COURT: What is this? Just fill me in what this letter is about.

MS. HUTCHINSON: This letter is just to show that they did have this scheduled meeting, and that it was August 8, 1995, and sort of just, you know, gives a foundation for what his next question—

THE COURT: All right. Go ahead. And did you put that as Exhibit—

THE DEPUTY CLERK: Plaintiff Thomas' 1, Your Honor.

THE COURT: Okay. Go ahead.

[236] THE WITNESS: Did someone have a question for me?

THE COURT: She's going to have it in a second.

MS. HUTCHINSON: As soon as I—

THE WITNESS: Oh, I'm sorry.

THE COURT: Why don't you start asking. He can read it. Oh, you're going to have to show it to—

MS. HUTCHINSON: Yes, I'm going to have to show it to him. But I can ask him.

BY MS. HUTCHINSON:

Q. At this meeting that you attended in August of 1995, did you discuss at that meeting the actual prospective relief in terms of the Council for Diversity and EEO awareness and the monitoring of the consent decree?

A. Yes, we did. We discussed the full range of the consent decree that we had rejected, and we submitted both written and oral comments and stated fully that we opposed, what our objections were, ranging from EEO to the dispersement calculations of damages. I mean, we spent a number of hours there, and we covered I would call the waterfront.

Q. Now, I want to show you what's been marked for identification as Plaintiff's Exhibit Thomas 1 and ask you to identify it please.

A. Well, actually this is a letter that I wrote to Judge Sporkin with a copy to Carl Anderson and to John Birch, and it was to indicate to the Judge that we are not in agreement [237] with many of the things which were being put forth under the heading of acceptances by the plaintiffs and the Legal Action Committee. So that's what that was about.

Q. Now, what date is that letter that's Plaintiff's Exhibit Thomas 1?

A. This is dated September 25, 1995.

Q. And would you go to the third page of that document please?

A. The third page?

Q. Yes, the third page.

A. Okay. I'm here at the third page.

Q. And on the third page, is that—what's the date of that particular document that is the third page?

A. It's dated August 5, 1995.

Q. And in that particular document that's dated August 5, is there a reference in the first paragraph to a number of written comments that you were going to present at the meeting of August 8?

A. Yes. It says attached are the addendum comments, which cover the extra pages in the document forwarded to us on July 25, 1995.

Q. And at the meeting on August 8, were those comments present and was Mr. Kirkland present at that meeting of August 8?

A. Yes. We passed them out, and we discussed them.

[238] Q. Okay. And was there any indication by you as plaintiffs at that meeting on August 8 as to whether or not you were satisfied with the EEO diversity program and all the monitoring aspects of the decree?

A. Well, it was at that time that we said that there were certain aspects which the State Department had accepted and that we said probably could be put in, but that there had to be quite a bit more work being done with regard to the GAO reports and the deficiencies and to verify whether or not, in fact, the State Department had complied with certain deficiencies in the audit done by the GAO.

And there were just a number of things. And, of course, there was a memorandum also forwarded in addition to this saying that more work had to be done in the area of EEO.

Q. Now, in terms of Mr. Kirkland's role at that meeting, was he under the impression that your concerns were minor concerns?

A. Oh, no, I don't think—no. They weren't taken as minor concerns. These were concerns which we had not verified to have been satisfied or that we were not satisfied with and we stated emphatically at the meeting that there

were many areas which could not be accepted under the present condition. And as a matter fact, we stated that the—

Q. Okay. That's fine. Let me ask you this.

After that meeting of August 8, 1995, did there ever come [239] a time when you informed Mr. Kirkland that you were satisfied as plaintiffs with the total EEO monitoring and prospective relief that had been designed?

A. No, we didn't say that we—

Q. Thank you.

A. No, we did not.

MS. HUTCHINSON: That's all I have.

THE COURT: Well, what would you like to tell me? You waited all day. Let me just ask you a question or two.. I think I want to put something in perspective.

How many objectors do we have to this, 57?

THE WITNESS: Objectors to the consent decree?

THE COURT: Yes.

THE WITNESS: Your Honor, I believe there are something like 56 or 58, if I'm not mistaken, but it's something to that—almost 60.

THE COURT: And so that's—what percentage is that, almost 15 percent of the total?

THE WITNESS: If you add the other 18 of us who oppose it, then you'd have maybe 60 with another 18.

THE COURT: So we're talking about 25 percent, right?

THE WITNESS: Yes, Your Honor, I believe in that area.

MR. SELLERS: Your Honor, I believe the 58 include [240] the 18.

THE COURT: Do they include the 18?

MR. SELLERS: I believe so.

THE WITNESS: Well, I believe that they were separated, Your Honor. We already had those of us who already opposed it and then it was sent out for comment, and those are the comments that came back. But at any rate, it was opposed.

THE COURT: And you can give me succinctly your position here.

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead.

THE WITNESS: Your Honor, we have listened to a very eloquent group, and there's been a central theme from even those who have accepted this consent decree to say that in some instances they're doing it because they want to move on. Some instances they say they want to give the State Department a chance to show that it's not going to continue what they perceive to be a pattern and practice of racist activity.

And as you know, Your Honor, I have said from the very beginning that there was no way that this consent decree was going to be accepted by us unless it contained equity and we understood fully that along with each settlement there has to be give and take on both sides, Your Honor.

But the fact still remains that a consent decree that does not address the issues of the lawsuit that I brought [241] and which, in fact, does little to change that which has been established and still is maintained so that whites can maintain a privileged class and work status at the State Department, it will not be accepted.

So my position is the same as the first day that I came to you, and you asked—maybe it wasn't the first day. Maybe it was in January, and you asked, didn't I want to do it in a democratic way and didn't I want to work and reach a situation and position where we might resolve this. And without going into whether or not one has or has not integrity, Your Honor, let me say this. And this is sort of a rhetorical kind of question to the Court.

If the Court, if you hired lawyers to carry out a mission that you considered extremely serious and that it affected you for all of your life, and they said to you that you couldn't be a part of that process, and, in fact, in instances made it quite clear that you were not a part

of that process, and in that process within the time that you had given them to move and do the things that you had asked them to do, those things weren't done.

And if you come back to the basis of what I'm saying, Your Honor, is as I said to you, no deal is better than a bad deal. And this is a bad deal. And now we've gone through everything that the Court asked us to do. You asked to have the democratic process take place and we did that. [242] And we've tried to become a part of this process, and we've been walled out of it.

And it happened with out our own lawyers. Now, I'm not going to go into the integrity part, Your Honor. I understand your feeling on the integrity, but we have to make that decision about integrity and what's being done for us. Because after all, they are not doing this to the Court. They're doing this to us. And centrally throughout every single theme that has been presented to this Court has run, even for those who've accepted it, some have said they've accepted it out of bare necessity. Some have said it was accepted because they want to move on with their lives.

But consistently, no one has come here to say to this Court that there is not blatant systemic racism that is being carried out by people who have a temperature of 98.6. It's not the tables over there doing it. It's not the water fountains. It's nothing but actual bodies obstructing us and discriminating against us to maintain a privileged situation, which, in fact, the children of some of our attorneys if they're graduating from school this year to come into the State Department would reap the benefits of.

And yet they come to us and tell us that they did the best they could, but we couldn't hear them. We couldn't come into the room. Well, I'll move on, Your Honor.

* * * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 86-2850 SS

WALTER THOMAS, *et al.*,
Plaintiffs

v.

MADELINE K. ALBRIGHT,
Defendant

PLAINTIFFS WALTER THOMAS AND ALAN B. C. LATIMER'S MOTION TO SUPPLEMENT THE PLAINTIFFS' OBJECTIONS TO THE CONSENT DECREE WITH NEW AND ADDITIONAL EVIDENCE

Now come the plaintiffs Walter Thomas and Alan B. C. Latimer pursuant to Fed. R. Civ. P. 15(d) and request the court to permit the supplementing of the plaintiffs' Preliminary Objections To The Consent Decree and Objections To The Consent Decree in this action with the following new and additional evidence which was received by the plaintiffs' counsel on or about March 19, 1997 and which had previously not been made known to the plaintiffs and the plaintiffs' counsel as set forth herein.

1. On or about March 11, 1997, Walter Thomas, a plainiff in this action, wrote to Richard Schlegel, attorney for plaintiffs in this action as set forth in Exhibit A herein and made a part hereof.

2. During the processing of this civil action up to and including the receipt of the letter by plaintiff Thomas' counsel on March 19, 1997, plaintiff Thomas had not seen nor had plaintiff Thomas been given a copy of the signed side agreement dated March 19, 1996.

3. Barbara B. Hutchinson, counsel for plaintiffs Thomas and Latimer had been informed that the Consent Decree was to remain silent on the issue of opting out and that counsel for this action representing the plaintiff class would not take a position on the issue of opting out, but no written agreement was provided to plaintiffs' counsel nor was plaintiffs' counsel informed that a written agreement had been signed by the parties, Affidavit of Barbara B. Hutchinson, Exhibit B hereto and made a part hereof.
4. Counsel for plaintiffs Thomas and Latimer would have filed a copy of the agreement with the court in support of their objections had counsel for the plaintiffs been provided with a copy of the agreement, Exhibit B hereto.

Wherefore, the paintiffs, for good cause shown, respectfully request that the court grant the plaintiffs Motion To Supplement The Objections of Walter Thomas and Alan B. C. Latimer with the new and additional evidence which was provided to the plaintiffs on March 19, 1997.

Respectfully,

/s/ Barbara B. HUTCHINSON
Barbara B. Hutchinson
D. C. Bar #418967
7907 Powhatan Street
New Carrollton, MD. 20784
Telephone: (301) 577-3387

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Acti on No. 86-2850 SS

WALTER THOMAS, *et al.*,
Plaintiffs

v.

MADELINE K. ALBRIGHT,
Defendant

AFFIDAVIT OF WALTER THOMAS

I, Walter Thomas, am one of the plaintiffs who initially filed this action and a class representative of the class. As an individual plaintiff and class representative, I have been in constant communication with the attorneys throughout the processing of this litigation. I specifically as class representative and on behalf of myself as an individual requested that the attorneys provide in the Consent Decree which settled the action, a provision for individuals to opt out of the settlement. I had communicated with the attorneys for the plaintiffs both orally and in writing on this matter. I sent a letter, in 1995, to Carl Anderson, who had been retained to represent the interests of the plaintiffs and plaintiff intervenors stating that we did not want the Consent Decree to be silent on the matter of opting out. During the time period from January 1, 1996 through March 19, 1997, I was never told that the attorneys had signed a written agreement with the defendant such as the one, dated March 19, 1996, which is attached to the Affidavit of Barbara B. Hutchinson. I also was never shown the written agreement that had been executed by the attorneys on this matter. I did write the letter dated March 11, 1997 to Mr. Richard

Schlegel inquiring as to the representation of the class. I did not know of the written agreement until it was provided to my attorney Barbara B. Hutchinson on March 19, 1997.

If I had known of the written agreement, I would have informed my attorney, would have testified to this fact during the approval process, and brought this matter to the attention of the court.

I swear under penalty of perjury that the foregoing is a true and correct statement to the best of my knowledge and belief.

This 2nd day of April, 1997.

/s/ Walter Thomas
WALTER THOMAS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 86-2850 SS

WALTER THOMAS, *et al.*,
Plaintiffs

v.

MADELINE K. ALBRIGHT,
Defendant

AFFIDAVIT OF BARBARA B. HUTCHINSON

I, Barbara B. Hutchinson, am the attorney representing the individual interest of Walter Thomas and Alan B. C. Latimer in this action. During the approval process of the Consent Decree in this action, I was told that the attorneys had agreed that the Consent Decree would contain no language on the opt out rights of individuals and that the plaintiffs attorneys would not speak to the opt out issue or take a position before the court. I was never informed that the plaintiffs attorneys had agreed in writing to ". . . state to the Court that the settlement is fair and reasonable . . ." and ". . . take no position in this or any other court on the permissibility of opt-outs.

I received the written agreement dated March 19, 1996, Exhibit 1 hereto and made a part hereof, from Mr. Richard Schlegel and Avis Buchanan in response to a letter from Walter Thomas dated March 11, 1997, Exhibit 2, attached hereto and made a part hereof. At no time during my representation up to and including March 19, 1997, was I ever informed of the existence of a written agreement or shown the written agreement which is Exhibit 1 to this affidavit. Had I known of the existence of this agreement, I would have requested the pro-

duction of the agreement and would have submitted the agreement as part of the objections of my clients to the approval of the Consent Decree. Upon receipt of the written agreement dated March 19, 1996, I checked my records and requested my client to check his records. We found no existence of the agreement in any documentation provided to us in the processing of this action.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

This 2nd day of April, 1997.

/s/ Barbara B. Hutchinson
BARBARA B. HUTCHINSON

March 19, 1996

John Oliver Birch, Esq.
Acting Chief, Civil Division
Office of the U.S. Attorney
District of Columbia
555 4th Street, N.W.
Washington, D.C. 20001

Re: *Thomas v. Christopher—CA No. 86.2850*

Dear Mr. Birch:

This letter confirms the agreement we reached during the negotiation of the *Thomas v. Christopher* Consent Decree relative to the issue of opt outs.

The parties have agreed that (1) the Consent Decree will be silent on the issue of opt outs; (2) we will not advocate opt outs to class members; (3) we will state to the Court that the settlement is fair and reasonable to the class as a whole and that, in the current procedural posture of this case, we do not represent class members in their individual capacities; (4) we will advise class members who may wish to opt out that they may make that request to the Court, but that we will not represent or otherwise assist them in making that request or in any subsequent appeal of the opt-out issue in the *Thomas* case; and (5) if asked by the Court on the law concerning the issue of opt outs in a 23(b)(2) class, we will take no position in this or any other court on the permissibility of opt-outs in the *Thomas* case, other than to inform the Court that the issue is currently on appeal to the Court of Appeals for the District of Columbia from a decision denying opt outs by Judge Johnson in *Cook v. Billington.* C.A. No. 82-0400.

Please indicate your confirmation of and agreement to the foregoing paragraphs by signing and returning one

of the originals to me. Please retain the other signed original for your files.

Respectfully submitted,

/s/ Joseph S. Sellers
JOSEPH M. SELLER, ESQUIRE
AVIS BUCHANAN, ESQUIRE
The Washington Lawyers Committee for Civil Rights & Urban Affairs

/s/ John Oliver Birch
JOHN OLIVER BIRCH

/s/ Warren E. Connelly
WARREN E. CONNELLY, P.C.
MICHAEL J. MADIGAN, P.C.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.

/s/ Carl E. Anderson
CARL E. ANDERSON, ESQUIRE
Walter & Haverfield

March 11, 1997

Richard P. Schelegel
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Ref: Department of State's Appeal of Consent Decree

Dear Rick:

Until now, Akin Gump and the Washington Lawyer's Committee have not submitted documents to the court that indicate that you will take a position relative to the Department of State's recent appeal. The Legal Action Committee (LAC) wants to know what action you will take to defend the decree and our rights, including but not limited to opting out.

If you do not plan to make an appearance on our behalf, please inform me and the Committee as to how Akin Gump regards its legal relationship with the LAC, class representatives, plaintiff intervenors, and the three hundred fifty nine (359) class members, at this point in the proceedings.

We look forward to your prompt reply.

Sincerely:

/s/ Walter J. Thomas
WALTER J. THOMAS
Chairperson
Legal Action Committee

STATUTE

§ 2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * *

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Excutive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision

or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Pub.L. 88-352, Title VII, § 717, as added Pub.L. 92-261, § 11, Mar. 24, 1972, 86 Stat. 111, and amended 1978 Reorg.Plan No. 1, § 3, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 96-191, § 8(g), Feb. 15, 1980, 94 Sta. 34.

RULE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class pre-

dominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an

order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

RULE 1.2 . SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2) (2)

Nos. 98-326 and 98-338

In the Supreme Court of the United States

OCTOBER TERM, 1998

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in its application of discretionary factors to determine that members of a class, which was certified under Federal Rule of Civil Procedure 23(b)(2), should not be permitted to opt out of a class settlement.

2. Whether petitioners, as named plaintiffs or plaintiff-intervenors, have a special status that bars a court from dismissing their individual claims as part of a global settlement if they object to the terms of the settlement.

3. Whether the court of appeals failed to consider the adequacy of class counsel's representation.

4. Whether the particular settlement agreement reached in this case was fair, adequate, and reasonable.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-326

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

No. 98-338

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Thomas Pet. App. 1a-19a; Fields Pet. App. 1-25[1]) is reported at 139 F.3d 227. The memorandum opinion and order of the district

[1] "Thomas Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-326, and "Thomas Pet. App." refers to the appendix attached thereto. "Fields Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-338, and "Fields Pet. App." refers to the appendix attached to that petition.

court (Thomas Pet. App. 20a-60a; Fields Pet. App. 29-76) are reported at 169 F.R.D. 224.

JURISDICTION

The court of appeals entered its judgment on March 27, 1998. A petition for rehearing was denied on May 27, 1998. Thomas Pet. App. 61a; Fields Pet. App. 28. The Thomas petition for a writ of certiorari was filed on August 24, 1998, and the Fields petition was filed on August 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal Rule of Civil Procedure 23(b) authorizes the maintenance of three different types of class actions in federal district courts. A class action may be certified under Rule 23(b)(1) if the prosecution of separate lawsuits by each individual member would create a risk of "inconsistent or varying adjudications * * * which would establish incompatible standards of conduct for the party opposing the class," or if the resolution of the individual claims "would as a practical matter be dispositive of the interests of the other members" or would "substantially impair or impede their ability to protect their interests."

A class action may be certified under Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Finally, a class action may be certified under Rule 23(b)(3) if "questions of law or fact common to the members of the class predominate over any questions

affecting only individual members" and proceeding by way of a class action is deemed preferable to "other available methods for the fair and efficient adjudication of the controversy." See *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2245-2247 (1997) (analyzing Rule 23's different class certification options). Rule 23(c)(2) expressly provides that individual members of a class certified under Rule 23(b)(3) must be afforded adequate notice of and the opportunity to opt out of the class action. Rule 23, however, makes no provision for excluding individual members of classes certified under (b)(1) or (b)(2).

2. Petitioners are seven current or former African American State Department Foreign Service Officers who alleged race discrimination and unlawful retaliation by the State Department in a variety of personnel practices. In 1986, petitioners filed a class action lawsuit against the State Department under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioners alleged discrimination on the basis of race, both in the form of disparate impact and disparate treatment, in the Department's policies and practices involving assignments, performance appraisals, promotions, tenuring, selection out, and retaliation. Thomas Pet. App. 2a-3a, 21a-22a, 23a.

Petitioners moved for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). Petitioners alleged that the State Department had acted or refused to act on grounds that were generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Thomas Pet. App. 2a; see also 1 C.A. App. 100 (contending that the case presented "the classic role" for Rule 23(b)(2)).

After lengthy settlement negotiations, the parties entered into a consent decree. Thomas Pet. App. 2a-3a. The parties agreed to seek class certification pursuant to Rule 23(b)(2). *Id.* at 3a. The consent decree was intentionally silent on whether individual class members would be permitted to opt out of the settlement. The consent decree resolved all of petitioners' claims, including attorneys' fees and costs. *Id.* at 3a-4a. The essential features of the agreement are: (1) retroactive promotions, (2) reinstatements, (3) an injunction prohibiting the State Department from discriminating against African American Foreign Service Officers in promotions, assignments, tenuring, and selection out, (4) establishment of a senior-level "Council for Equality in the Workplace" to advance equal employment opportunity and civil rights within the Department, (5) a comprehensive job analysis of Foreign Service Officer job duties and, if appropriate, revision of evaluation forms, (6) revision and expansion of diversity and equal employment opportunity training within the Department, (7) implementation of an approved affirmative action plan consistent with the Equal Employment Opportunity Commission's applicable regulations, (8) creation of a working group to monitor the grant of awards to employees, (9) continued development of an electronic personnel database to monitor employment actions, (10) a duty to report employment information to class counsel for four years, (11) an agreement to undertake efforts to diversify boards reviewing the termination of African American employees, (12) payment of $3.8 million to the class, and (13) payment of $2.1 million in attorneys' fees. See *ibid.* The State Department opposed any opt-outs and, as part of the settlement agreement, attorneys for the class agreed not to advocate a position on the opt-out issue. *Id.* at

4a. The notice of the fairness hearing on the proposed settlement did advise the class members, however, that the district court would decide "whether the right to opt out exists" and that those wishing to pursue opt-out should notify the court of their interest. *Id.* at 65a. Nineteen members initially requested to opt out of the class. *Id.* at 5a.

Following the fairness hearing, the district court entered a final order in which it approved the consent decree, but also allowed the members of the class who previously had expressed an interest in opting out to do so. Thomas Pet. App. 59a-60a. Ultimately, only nine members, out of a class of approximately 360, requested to opt out of the settlement. *Id.* at 5a.

3. The parties cross-appealed. The petitioners appealed the district court's approval of the consent decree. The government objected to the district court's decision to permit opt-outs, on the ground that this Court's decision in *Amchem Products, Inc.* v. *Windsor*, *supra*, barred judicial amendment of Rule 23's textual limitation of opt-outs to (b)(3) class actions.

The court of appeals affirmed the district court's decision approving the consent decree, finding that the settlement was "eminently fair and reasonable to the class as a whole." Thomas Pet. App. 6a. The court carefully evaluated the terms of the settlement in light of the strength of the plaintiffs' claims. *Id.* at 6a-11a. In particular, the court noted that a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *Id.* at 10a.

With respect to the issue of opt-outs, the court of appeals reversed. The court of appeals agreed with petitioners that Rule 23(b) is sufficiently flexible to afford district courts the discretion to grant opt-out rights in Rule 23(b)(2) class actions. Thomas Pet. App.

14a (citing *Eubanks* v. *Billington*, 110 F.3d 87 (D.C. Cir. 1997)). Specifically, the court ruled that Rule 23(d)(5), which authorizes courts to make "appropriate orders" to govern procedural matters, "is broad enough * * * to permit the district court to provide for opt-outs when appropriate in * * * (b)(2) class actions." *Ibid.* The court nevertheless concluded that the district court abused its discretion in permitting opt-outs in this case because (i) the assumption of cohesiveness underlying the Rule 23(b)(2) certification was not undercut by the individual claims for money damages, *id.* at 16a-17a, and (ii) the claims of the class members who sought to opt out were not "so atypical of the claims of the class as to justify permitting them to opt out," *id.* at 17a.

ARGUMENT

The questions for which petitioners seek this Court's review either were resolved in petitioners' favor by the court of appeals or present fact-bound determinations about which there is no conflict in the circuits. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Thomas Pet. 5-10; Fields Pet. 15-17) that this Court should grant a writ of certiorari to review whether the court of appeals erred in determining that the class was not "akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1) and that no other discretionary factors warranted the authorization of opt-outs in this case (Thomas Pet. i; Fields Pet. i). That case-specific and record-bound determination does not warrant this Court's review.

a. As an initial matter, the petition does not present the broad question of whether courts may ever permit opt-outs in Rule 23(b)(2) class actions. Both the district court and the court of appeals agreed with petitioners that courts have such discretion. See Thomas Pet. App.

11a-15a; Fields Pet. App. 13-18; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Because the court of appeals (and the district court) adopted petitioners' arguments in this regard, petitioners are ill-positioned to seek this Court's review of that favorable ruling. Cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980).[2]

Nor do petitioners contend that they have an absolute right to opt out of a Rule 23(b)(2) class action. They advance no such argument in their petitions here and made no such argument below; and both the district court and the court of appeals predicated their rulings on the application of discretionary factors. See Thomas Pet. App. 11a-15a, 54a-57a; Fields Pet. App. 13-18, 72-75; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Nor are we aware of any court of appeals' ruling that has recognized an absolute right to opt out in the Rule 23(b)(2) context.

b. Because the court of appeals applied the very discretionary standard that petitioners advocated, petitioners simply seek this Court's review of the court of appeals' application of that standard to the particular facts of their case. That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981). Indeed, the determination by the court of appeals (Thomas Pet. App. 16a-17a; Fields Pet.

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[2] Although petitioners (Thomas Pet. 5-10; Fields Pet. 16-17) invoke the Due Process Clause before this Court, U.S. Const. Amend. V, that argument made no appearance in petitioners' court of appeals briefs, which acknowledged the discretionary limitations on the right to opt out. See Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9.

App. 18-20) that claims for money damages neither predominated in the present litigation nor undercut the cohesiveness of the class, so as to make the class "more akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1), is a record-specific determination, the resolution of which would offer little practical guidance to other courts' disposition of other cases. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). Similarly, the court's conclusion (Thomas Pet. App. 17a-19a; Fields Pet. App. 20-23) that petitioners' monetary claims are not unique or atypical, so as to justify permitting them to opt out and thus obtain a dispensation different from other class members, is a factual determination that does not merit further review.

Moreover, the court of appeals' application of a standard that limits opt-outs under Rule 23(b)(2) to instances where either individual claims for money damages are sufficiently substantial to affect the cohesiveness of the class, or the individual's claims or injuries are atypical, is consistent with the decisions of other circuits. See, *e.g.*, *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (due process requires opt out in Rule 23(b)(2) action where "substantial" money damages are at issue) (emphasis omitted), cert. dismissed, 511 U.S. 117 (1994); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1302-1305 (2d Cir. 1990) ("courts have narrow discretionary power to allow [opt-outs]" in actions certified under Rule 23(b)(1)); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.) (Rule 23(b)(2) class members have no automatic right to opt out, but district court may grant opt-out as a matter of discretion), cert. denied, 479 U.S. 883 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d

1144, 1151-1160 (11th Cir. 1983) (opt-out permitted in class action certified under Rule 23(b)(2) where money damages claims undercut cohesiveness of the class and made it more analogous to a Rule 23(b)(3) class); *Laskey* v. *International Union, United Auto., Aerospace & Agric. Implement Workers*, 638 F.2d 954, 956-957 (6th Cir. 1981) (no automatic right to opt out under Rule 23(b)(2) and, under circumstances of the case, due process did not require opt-out); *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 506-507 & n.10 (5th Cir. 1981) (opt-outs under Rule 23(b)(2) are permissible, in exercise of district court's discretion, but are not mandatory). Furthermore, the factors that courts of appeals consider in determining whether to permit opt-outs largely coincide. See, *e.g.*, *Brown*, 982 F.2d at 392; *Long Island Lighting*, 907 F.2d at 1302-1305; *Cox*, 784 F.2d at 1554; *Holmes*, 706 F.2d at 1151-1160; *Kincade*, 635 F.2d at 506-507 & n.10 (all—focusing on effect of individual claims on class cohesiveness, class's similarity to a Rule 23(b)(3) class, or the unique facts and circumstances of particular claims). Any minor deviations in the articulation of the opt-out standard would not be of sufficient practical import to warrant this Court's review.

c. Contrary to petitioners' contention (Thomas Pet. 10; Fields Pet. 17), this case does not pose the question presented, but not decided, in *Adams* v. *Robertson*, 117 S. Ct. 1028 (1997) (per curiam), and *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam). The issue in those cases was whether due process required the opportunity to opt out of a Rule 23(b)(1) or (2) class action that "involved primarily money damages claims." *Ticor*, 511 U.S. at 120 (emphasis omitted); see also *Adams*, 117 S. Ct. at 1029 (action "primarily involving claims for monetary relief"). This case, by contrast,

involves "predominantly equitable claims." Thomas Pet. App. 16a, 44a-45a. The district court found, and the court of appeals agreed, that "the plaintiffs sought extensive injunctive and systemic relief in addition to monetary damages," in an effort to correct "a system of personnel actions that have been uniformly imposed on all class members." *Id.* at 16a (quoting district court opinion) (internal quotation marks omitted). The bulk of the consent decree's provisions, moreover, addressed changes in State Department personnel practices and equitable reinstatements and promotions, rather than monetary compensation for class members. See *id.* at 3a-4a.[3]

d. Review is also not appropriate because the court of appeals' judgment that opt-outs should not be permitted was correct. *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 n.11 (1986) (opinion of Stevens, J.) (the Court "reviews judgments, not opinions"). In *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997), this Court held that the class certification criteria established in Rule 23 must generally be adhered to, even when a class is being certified solely for purposes of settlement. *Id.* at 2248-2249. In so holding, the Court cautioned that, when applying Rule 23,

> courts must be mindful that the rule as now composed sets the requirements they are bound to

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[3] For the same reason, petitioners' argument (Thomas Pet. 8; Fields Pet. 17) that the decision to deny opt-outs in a Rule 23(b)(2) action is contrary to *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), is incorrect. *Shutts* "[wa]s limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. The Court specifically stated that it "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-812 n.3.

> enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered.

Amchem, 117 S. Ct. at 2248 (citations omitted).

The text of Rule 23 plainly authorizes opt-outs only for classes certified under Rule 23(b)(3). No opt-out procedure is authorized for Rule 23(b)(2) (or Rule 23(b)(1)) classes. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974). Petitioners' effort to craft an opt-out provision for Rule 23(b)(2) class members thus would substitute "a rule outside the process Congress ordered" for "the rule as now composed," which is contrary to *Amchem*, 117 S. Ct. at 2248. Cf. *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act," courts must "presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Because Rule 23 does not provide for opt-outs in (b)(2) class actions, as it specifically does in (b)(3) class actions, the court of appeals' judgment denying petitioners the right to opt out of this settlement was correct, and further review is not warranted.[4]

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[4] This Court's decision in *Amchem Prods., Inc.* v. *Windsor*, *supra*, further undercuts petitioners' claims of an inter-circuit conflict because all of the cases upon which they rely pre-date that ruling.

2. The Thomas petitioners also argue (Thomas Pet. 10-13) that the court of appeals erred in approving a settlement that dismissed their individual claims without their consent. They assert that the court of appeals' decision is "in conflict with" (Thomas Pet. 11) *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984), and that their special status as named plaintiffs or plaintiff-intervenors required individualized consent before their claims could be dismissed (Thomas Pet. 12-13). That claim does not merit this Court's review.

Cooper decided only that, under traditional principles of res judicata and collateral estoppel, individual discriminatory treatment actions could be prosecuted after a class action had been dismissed for failure to prove that the employer engaged in a general, class-wide pattern or practice of racial discrimination. 467 U.S. at 875-881. *Cooper* thus has no bearing on the present case where, as a result of a global settlement, petitioners' individual claims were resolved and petitioners' only objection is to the amount of their recovery. See Thomas Pet. App. 17a ("[Petitioners] argue merely that they stand to be undercompensated for their injuries.").

Petitioners' reliance (Thomas Pet. 11-13; Fields Pet. 13) on *Mandujano* v. *Basic Vegetable Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); and *Ficalora* v. *Lockheed Calif. Co.*, 751 F.2d 995 (9th Cir. 1985) (per curiam), is similarly misplaced. Those cases held only that, when approving class action settlements, district courts must afford careful consideration to the objections raised by the named plaintiffs, while keeping in mind the best interests of the class as a whole. *Ficalora*, 751 F.2d at 996-997; *Pettway*, 576 F.2d at 1214-1217; *Mandujano*, 541 F.2d at 835. The district court and court of appeals

here did precisely that. Thomas Pet. App. 10a, 53a ("Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration."). The court's ruling thus comports, rather than conflicts, with the decisions of those other circuits, making this Court's review unnecessary.[5]

Petitioners also contend (Thomas Pet. 12-13) that *Deposit Guaranty National Bank* v. *Roper*, *supra*, demonstrates that named plaintiffs have special rights in class action cases. *Deposit Guaranty*, however, decided only that a named plaintiff can appeal a denial of class certification even after his individual claim has been satisfied. 445 U.S. at 332-340. *Deposit Guaranty* is thus of no help to petitioners.

3. Petitioners argue (Thomas Pet. 13-14) that the court of appeals erred in failing to consider whether the agreement of class counsel not to take a position on the opt-out issue deprived the class of adequate representation, as required by Rule 23(a)(4). That argument is meritless. The court of appeals separately reviewed counsels' decision to advise class members that they could petition the court to opt out, but not otherwise to litigate the issue (see Thomas Pet. App. 65a, 178a). The court specifically concluded that counsels' limited posi-

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[5] Petitioners seem largely to object to the differences between the methods for resolving individual and class action lawsuits. It is petitioners, however, who elected to pursue their claims through the vehicle of a class action and enjoyed the "substantial advantages" that can accrue from such a procedure. *Deposit Guaranty*, 445 U.S. at 338. As named plaintiffs, moreover, petitioners had an enhanced opportunity to frame and manage the conduct of the litigation from the outset, including the choice to seek certification under Rule 23(b)(2) rather than (b)(3).

tion on the opt-out issue represented, not collusion, but a permissible compromise necessary to reach closure on one provision of the consent decree. *Id.* at 11a ("counsel more than adequately represented the class as a whole" and "[t]he letter agreement [on opt outs] * * * was part of [the] global compromise between the parties"). In any event, such a fact-specific claim is not of sufficiently broad or enduring importance to merit this Court's review.

4. Lastly, petitioner Fields seeks this Court's review (Fields Pet. i, Question 2) of whether the settlement was fair and reasonable to the class as a whole. That record-specific and fact-intensive claim presents no question of broad or prospective significance that would merit this Court's review. See *Sumner*, 449 U.S. at 543. Such review is particularly unjustified where, as here, the district court and the court of appeals both agreed in their assessment of the record and their application of the proper legal standard to it. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), adhered to on reh'g, 339 U.S. 605 (1950); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).[6]

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[6] Petitioner Fields also argues (Fields Pet. i, Question 3) that the State Department continues to engage in discrimination. Pursuant to the terms of the consent decree, the district court retains jurisdiction over implementation of the consent decree for four years. See Thomas Pet. App. 107a. Accordingly, the proper forum for that aspect of petitioner Fields' complaint is the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER J. THOMAS, *et al.*,
Petitioners,

v.

MADELEINE ALBRIGHT, Secretary,
Department of State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CLASS OF AFRICAN-AMERICAN FOREIGN SERVICE OFFICERS SUBJECT TO THE CONSENT DECREE IN THOMAS v. ALBRIGHT, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the approximately 360 member class of African-American Foreign Service Officers employed by the State Department who are beneficiaries of the terms and conditions of the classwide settlement, embodied in a 1996 consent decree, which was approved by the district court and affirmed by the court of appeals over the objections of a small minority of individual class members. The petitioners here are six class members who believe that some, but not all, of the provisions in the consent decree were improperly negotiated and then approved by the lower courts over their objection. Amicus curiae has a strong interest in obtaining the relief which the consent decree provides, but which has not yet been implemented due to the pendency of this petition and, therefore, it opposes the petitioners' effort to overturn the decree.

SUMMARY OF THE ARGUMENT

Petitioners, in their second and third alleged reasons for granting the writ, seek to overturn the 1996 consent decree which settled, on a classwide basis, a Title VII race discrimination lawsuit originally brought against the Department of State in 1986.[2] They object to approval of the

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[1] Counsel of record for the respondent has consented to the filing of this brief, and its letter of consent has been filed with the Clerk pursuant to Rule 37. Counsel of record for the petitioners refused to consent for the reasons described in the letter attached hereto as Amicus App. 1a, i.e., that the class is properly regarded as a party, not as an amicus curiae. However, in the court of appeals, counsel for the petitioners filed a "Motion for Removal of the Entry of Appearance" by class counsel as counsel for cross-appellees, which the court granted, finding instead that the class should be treated as an amicus in the appeal. The court's order is attached hereto as Amicus App. 2a. Accordingly, the class contends that its amicus status should continue in this Court, but has no objection to being treated as a respondent. With the above understanding, counsel for a party has not authored this brief in whole or in part. No person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Consistent with the agreement which they reached with the government in a March 19, 1996 "side letter" (Pet. App. 178a-179a), counsel for amicus curiae

decree by the lower courts because they did not receive sufficient "individual relief" in that portion of decree which provided for: (1) classwide monetary relief totaling $3.8 million; (2) 17 retroactive promotions;[3] and, (3) 4 reinstatements of individuals who had previously been terminated from the Foreign Service. The essence of petitioners' complaint is that they did not get a sufficient personal share of the classwide settlement and that, as plaintiffs or plaintiff-intervenors, they had an absolute right to veto any settlement which did not satisfy their personal objectives. Moreover, they criticize counsel for the class for failing to adequately represent their interests by entering into a side agreement to the consent decree which pertained to how counsel for the parties would deal with the issue of opting out, upon which the consent decree itself was silent.

We will show, first, that a small number of plaintiffs cannot veto a classwide settlement, particularly where all the procedural and substantive requirements of a fairness hearing under Fed. R. Civ. P. 23 (e) have been satisfied.[4] We will

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continue to take no position on whether any class member had a right to opt out of the settlement, as petitioners claim in their first reason for granting the writ. We note, however, that this letter reflected a compromise reached after the government during settlement negotiations argued that the consent decree should expressly deny the right to opt out and class counsel argued that the consent decree should expressly permit the right to opt out. The letter agreement represented a compromise which preserved the right of separately retained counsel for the petitioners to argue the opt out issue to the district court. Thus, the letter agreement provided a benefit to the petitioners, not a detriment as they claim in their petition.

[3] The petition (at 3) erroneously suggests that counsel for the parties "identified" the 17 class members who would receive promotions. In fact, the consent decree itself, in Section IV(B)(1), Pet. App. 79a-80a, 123a-124a, contains an objective mechanism for selecting the promotees which is based on length of service in grade without promotion.

[4] Petitioners do not challenge the adequacy of the notice which every class member received of the terms and conditions of the consent decree before the district court approved it, nor do they claim that the district court failed to provide them a full opportunity to express their views both orally and in writing. The petitioners, moreover, were represented by their own separate counsel, not

then show that class counsel acted appropriately in seeking court approval of the consent decree after having satisfied themselves that it was fair, adequate, and reasonable to the class. Petitioners have failed to identify any "compelling circumstances," as required by Rule 10, which would warrant granting a writ of certiorari.

The district court approved the consent decree only after conducting an extraordinarily thorough examination of every provision in order to ensure that it was fair to the class and that it was not the product of collusion between counsel for the opposing parties. Pet. App. 20a-60a. It considered every aspect of petitioners' objections before affirming the consent decree, and the opinion is firmly grounded on a thorough review of the evidentiary record. The court of appeals opinion, Pet. App. 1a-19a, is equally thorough in evaluating whether the relief was fair to the class in light of all the relevant considerations. For all of these reasons, which we discuss in more detail below, this Court should deny the petition.

ARGUMENT

I. AN INDIVIDUAL PLAINTIFF DOES NOT POSSESS THE RIGHT TO VETO A CLASSWIDE SETTLEMENT

The six petitioners assert that the court of appeals did not have the power to approve the consent decree without their express consent, which they withheld because they did not receive all the relief to which they claim they were entitled.[5] The district court and the court of appeals rejected this

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undersigned class counsel, at the fairness hearing, so they cannot and do not claim that their views were not fully aired before the district court approved the settlement.

[5] Each of the six petitioners would receive substantial relief under the consent decree. Under the relief mechanism in the consent decree, 265 class members will receive an average of $10,900 apiece in "promotion damages." Pet. App. 34a. The six petitioners, as it turns out, will receive a considerably higher amount, exceeding $21,000 on average.

argument. They correctly recognized that it is inherent in a classwide settlement that some, or even all, class members will not receive 100 percent of the relief which they might receive if they chose to litigate to a conclusion their individual claims for relief. When settlement negotiations commenced, petitioners agreed with the decision to proceed on a classwide basis. Thus, their disagreement is not with the fact that a classwide settlement was eventually negotiated. Rather, they contest the failure of that settlement to provide them with sufficient restitution for alleged past acts of discrimination against them as individuals. However, the standard for approval of a class action settlement is whether it is fair, adequate, and reasonable to the class as a whole, which the lower courts held that the *Thomas* case settlement was.

Fed. R. Civ. P. 23(e) is expressly designed to protect the rights of all class members by allowing them to express their disagreement with the terms of a classwide settlement. Here, the district court held two sets of extensive hearings before preliminarily and then finally approving the settlement terms. Upon review of all of those terms, in light of the objections expressed both orally and writing by a total of 15 percent of the class, the trial court concluded that:

> Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled. After carefully considering the objections, the Court concludes that the Consent Decree as a whole is fair, reasonable, and adequate to the class. Accordingly, the Court will not deny final approval on the basis of those objections.

Pet. App. 53a. The trial court's conclusion is supported by a detailed analysis of the specific terms and conditions

governing, *inter alia*, promotions, reinstatements, and monetary relief. Pet. App. 47a-51a. The court of appeals conducted its own analysis, Pet. App. 6a-11a, and reached the identical conclusion:

> In sum, the dissidents complain about particular portions of the overall settlement and claim that they are individually entitled to more. It is the obligation of the district court, however, to evaluate the fairness of the settlement to the class as a whole. We conclude that the district court did not abuse its discretion in approving the consent decree as fair, adequate, and reasonable to the class as a whole.

Pet. App. 11a.

Petitioners are unable to identify a single instance in which a court has disapproved a class settlement on the ground that one or more plaintiffs objected to the amount of relief which they would personally receive pursuant to the settlement's terms. Nor have petitioners identified a case where a classwide settlement was overturned after a minority of the class objected to it. In fact, numerous courts have upheld class wide settlements over the objections of plaintiffs and other class members, as the district court noted. Pet. App. 52a. If this Court were to hold that a single plaintiff has an absolute veto right over a class wide settlement, it would effectively abolish the fairness hearing procedure required by Rule 23(e) since there would be no reason for such a hearing whenever a single plaintiff objected to a classwide settlement. We note, moreover, that petitioners have not shown why plaintiffs and plaintiff-intervenors are entitled to greater rights, when it comes to approving or disapproving a settlement, than other class members. They fail to provide any basis in law or fact for holding that they have a greater interest in, or power over, the terms and conditions of a settlement than any other class member.

The petitioners' claim (Petition at 11) that the court of appeals "gave no rationale for binding the petitioners" to the settlement is frivolous. The court specifically noted that, "[a] claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; as we indicated above a settlement necessitates compromise." Pet. App. 9a. Equally frivolous is the claim that the petitioners' individual claims "were not addressed by the proposed settlement agreement." Petition at 11. In fact, each of the petitioners will receive a share of the $3.8 million in class-wide monetary relief which was determined based on a formula approved by the court of appeals as "eminently fair and reasonable." Pet. App. 6a. *See* n.5, *supra*. The fact that no petitioner received reinstatement or retroactive promotion is similarly a function of the operation of the settlement agreement's objective procedural mechanisms and not a result of an intent to exclude or discriminate against the petitioners. The lower courts concluded, after carefully considering all of the evidence, that class counsel had adequately represented their interests and had not colluded with the government to deprive the petitioners of relief to which they were entitled. Pet. App. 10a-11a, 42a-44a.

Finally, petitioners' claim (Petition at 11) that the court of appeals had no "supporting evidence" to justify its affirmance of the settlement and instead relied solely on "the statements of counsel," is simply not true, as even a cursory examination of the district court and appeals court decisions reveals. It is accurate that no petitioner or, for that matter, no class member put on a complete presentation of a claim for individual relief (although several objectors described incidents of discrimination at the fairness hearing), but this is

almost always the case when a lawsuit is settled before trial and even more so the case when a class action is settled.[6]

The case law upon which the petitioners attempt to rely (Petition at 11-12) in support of their alleged right to veto a class settlement does not remotely support their position, and it is easily distinguished. In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), this Court held that the court of appeals' dismissal of a Title VII class action for lack of evidence as to a pattern or practice of race discrimination did not preclude, on the basis of the doctrine of *res judicata*, individual class members from then proceeding in the trial court with individual claims of discrimination. The key distinction is that the classwide settlement in the *Thomas* case resolved all of the claims of individual class members. It did not, as in *Cooper*, leave them open for litigation after rejection of the class action.

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976), is equally inapposite because, as the court of appeals noted, the "teaching" of that case is simply that "the opposition of a significant number of named plaintiffs 'is a factor to be considered when approving a settlement.'" Pet. App. 10a. However, the fact that five out of nine plaintiffs in *Mandujano* opposed a proposed class action settlement was not, as petitioners imply, deemed a legally sufficient reason to require disapproval of that settlement.

Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1177 (5th Cir. 1978), holds that a plaintiff may not "ignore the wishes of the class representatives in making fundamental litigation decisions." However, immediately before this holding, the court states that, "when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class

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[6] Only two of the six petitioners were identified as class representatives in the class certification motion which class counsel filed with the district court on June 15, 1994.

to rest exclusively with the named plaintiffs." *Id.* at 1176. Thus, class counsel here acted in accordance with *Pettway* in considering the wishes of both the petitioners and all other class members before proceeding first to negotiate the settlement and then seek court approval. No court has ever held that class counsel is obligated to comply with the desires of some of the plaintiffs, particularly where 85 percent of the class did not object to the settlement.

Finally, *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326, *reh'g denied*, 446 U.S. 947 (1980), is irrelevant. There, several individual plaintiffs sought to certify a class consisting of 90,000 credit card holders in order to sue a bank for imposing usurious finance charges on credit card balances. The district court denied plaintiffs' motion to certify the class. After an unsuccessful interlocutory appeal by the plaintiffs, the bank tendered payment to each individual plaintiff in an effort to moot the case. Plaintiffs refused to accept payment, but the district court nevertheless dismissed the case as moot. The court of appeals reversed, and this Court affirmed the court of appeals, holding that the plaintiffs' interest in proceeding with a class action was sufficient to overcome the bank's effort to moot their individual damage claims through payment in full of their alleged individual damages.

The factual distinction is obvious – here, a settlement was reached with the *entire class*, not just a few members of that class. The *Thomas* case settlement was approved after a fairness hearing in which dissidents were given a full opportunity to describe their concerns, which the district court and, later, the court of appeals, thoroughly considered. The decision in *Deposit Guaranty* in no way precludes this type of settlement procedure. Nor does it state that individual plaintiffs who disapprove of the amount tendered to them in a class action settlement may veto that settlement simply because they are plaintiffs.

II. CLASS COUNSEL FULFILLED THEIR OBLIGATIONS TO ALL CLASS MEMBERS

The petitioners suggest that class counsel's execution of a March 19, 1996 side letter with counsel for the State Department constituted a conflict of interest and a derogation of class counsel's duty to adequately represent the class.[7] Petitioners' discussion of the facts and circumstances surrounding the execution, terms, and disclosure of the agreement is factually misleading and does not provide legally sufficient grounds to reject the settlement.

Petitioners claim (Petition at 13) that the side letter was kept secret: "[t]he written agreement was not shared with the petitioners, class members, or the district court during the approval process." This claim is false, as shown by Exhibits attached hereto as Amicus App. 3a-6a, 7a-9a, which are pleadings filed by the government in the district court describing seven separate instances in which the petitioners and the district court were told of the existence of the side agreement and its contents.

Petitioners next claim (Petition at 13) that the side letter said that "no information would be provided to members of the class on their right to opt out of the action." In fact, clause (4) of the side letter states that class counsel "will advise class members who may wish to opt out that they may make that request to the Court. . . ." Pet. App. 178a. Thus, the side letter did not bind class counsel to silence. In fact, the side letter represented a negotiating success for class counsel on behalf of every class member who wanted to opt out. The State Department's negotiators wanted the settlement agreement to expressly state that class members would not be permitted to opt out of the settlement. Class counsel were successful, instead, in obtaining an agreement which was silent on the subject of opting out, precisely

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[7] The side letter is reprinted in Pet. App. 178a-179a.

because class counsel intended that this tactic would allow the petitioners to present their opt out argument to the district court for resolution. Moreover, the side letter did not deny information about the right to opt out as shown by the fact that 16 class members originally indicated to the district court that they wanted to opt out. Pet. App. 54a. The side letter stated that class counsel "would not advocate opt outs to class members," but it did not preclude class counsel from telling class members that they could present their opt out requests to the trial court. Through counsel retained for this purpose, they did precisely this.

Third, the petitioners claim (Petition at 13) that it was wrong for class counsel to agree in the side letter "to inform the court that the proposed settlement agreement was fair and reasonable . . . ." Petitioners overlook the fact that it was inherent in class counsel's role, having negotiated a settlement on behalf of the entire class that they believed was fair, adequate, and reasonable to the class as a whole, that they present that settlement to the court as satisfying Rule 23(e). Thus, agreeing in a side letter to urge the court to approve the settlement merely reiterated class counsel's pre-existing obligation under the law. To put it another way, if class counsel had thought the settlement was unfair and unreasonable to the entire class, class counsel would never have agreed to it or submitted it for approval.

Nothing in *Ficalora v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), upon which petitioners rely, supports their view that the side letter was improper. In that case, the court of appeals found "no inquiry by the [lower] court into the questioned activities of plaintiff class counsel with respect to the named plaintiff, Ficalora." *Id.* at 997. Here, in contrast, the district court conducted a searching inquiry into the issue of whether the terms and conditions of the settlement were fair, adequate, and reasonable to the petitioners and to every other member of the class. Pet. App.

25a-38a, 42a-54a. None of the petitioners' claims of inadequacy went unexamined, as distinguished from the situation in *Ficalora*. Accordingly, there is no basis to conclude that the interests of petitioners in opting out of the settlement were sacrificed or that class counsel failed in their duty to adequately represent the class. In fact, the district court found that class counsel fulfilled their duty of adequate representation, Pet. App. 42a-44a, for reasons which it explained at length, including over 125 meetings and 1000 telephone conversations with class representatives and other class members on the subject of settlement. The fact that some petitioners got less relief than that to which they believe they were entitled is not a permissible ground for overturning a class action settlement under Rule 23(e), particularly where the vast majority of the class did not object to the settlement.

CONCLUSION

For all of the foregoing reasons, amicus curiae requests that the Court deny the Petition.

Respectfully submitted,

RODERIC V.O. BOGGS*
AVIS E. BUCHANAN
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FOR CIVIL RIGHTS & URBAN AFFAIRS
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WARREN E. CONNELLY
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Attorneys for Amicus Curiae
* Counsel of Record

October 23, 1998

APPENDIX

APPENDIX

Barbara B. Hutchinson
Attorney
7907 Powhatan Street
New Carrollton, Md. 20784
(301) 577-3387

October 20, 1998

Mr. Warren Connelly
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue. N. W.
Suite 400
Washington, D. C. 20036

via facsimile message only

Re: *Thomas v. Albright*
Docket NO. 98-326

Dear Mr. Connelly:

In reference to the above, I received your facsimile message dated October 10, 1998 which was sent on October 20, 1998. I regret that I cannot consent to your filing of an amicus brief in this action. As representatives of the plaintiffs in this action, you and the individuals for whom you seek to file have a direct interest in the outcome of this petition and were parties to the litigation below. I do not believe that you qualify as an amicus in this petition since you are a party in interest in this action.

I am sorry that you did not bring this to my attention prior to October 20, 1998. Hopefully this does not cause you too much inconvenience.

Sincerely,
/s/
Barbara B. Hutchinson

[filed Sep. 26 1997]

United States Court of Appeals
For The District of Columbia Circuit

No. 97-5004 September Term, 1997
86cvO2850

Walter J. Thomas, et al.,
Appellees

v.

Madeleine K. Albright, Secretary of State,
Appellant

Consolidated with 97-5018

BEFORE: Edwards, Chief Judge; Ginsburg, Circuit Judge; and Buckley, Senior Judge

ORDER

Upon consideration of the motion for removal of entry of appearance, the opposition thereto, and the reply, it is

ORDERED that the motion for removal of entry of appearance be granted. It is

FURTHER ORDERED, on the court's own motion, that the class be allowed to participate in this appeal as an amicus curiae. *See* D.C. Cir. Rule 29.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Elizabeth V. Scott
Deputy Clerk/LD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 86-2850 (SS)
	)	
MADELEINE K. ALBRIGHT,	)	
	)	
Secretary, Department of State,	)	
	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS WALTER THOMAS AND ALAN B.C. LATIMER'S MOTION TO SUPPLEMENT THE PLAINTIFFS' OBJECTIONS TO CONSENT DECREE WITH NEW AND ADDITIONAL EVIDENCE

Defendant files this Response to Plaintiffs Walter Thomas and Alan B.C. Latimer's Motion To Supplement The Plaintiffs' Objections To The Consent Decree With New and Additional Evidence. Plaintiffs Thomas and Latimer wish to supplement the record with the side letter signed by class counsel and by government counsel in which class counsel agreed to take no position on the issue of whether opt outs are allowed under the settlement agreement. Defendant notes that this motion is unnecessary because the record already demonstrates that the Court and counsel for plaintiffs Thomas and Latimer were aware both of the existence of the agreement and of the existence of a letter memorializing the agreement. Defendant, however, does not object

if plaintiffs Thomas and Latimer wish to supplement the record with the letter.

First, Barbara Hutchinson, counsel for plaintiffs Thomas and Latimer, proposed in a letter dated March 20, 1996 that the notice to class members include the following statement: "Counsel for the class represented by Mr. Joseph Sellers, Michael Madigan, Warren Connelly, and Carl Anderson have taken no position on the matter of individuals opting out of the consent decree." March 20, 1996 Letter from Barbara Hutchinson to John Oliver Birch, Exhibit A. Thus, counsel for Thomas and Latimer has been award for some time of this agreement.

The record is replete with instances of where the class counsel mentioned the agreement, thus demonstrating that no one tried to hide the existence of the agreement from plaintiffs Thomas and Latimer. For example, at the Preliminary Fairness Hearing on March 19, 1996, Joe Sellers, class counsel, specifically informed the Court that the Consent Decree was silent as to the opt out issue and that class counsel had agreed to take no position on the issue. March 19, 1996 Preliminary Fairness Hearing, Exhibit A at 15-18.

Further, at the Fairness Hearing on July 15, 1996, Mr. Sellers, in response to the Court's question on whether the issue of opt outs is resolved by the Consent Decree, stated:

> Your Honor, can I just make the position of plaintiffs' class counsel clear on this. We agree that the decree is silent on this issue. We have agreed in the course of negotiations not to take a position on whether opt out is available.

July 15, 1996 Hearing, Exhibit B.

At the July 23, 1996 Fairness Hearing, Mr. Sellers again stated the following:

> Your Honor, I just wanted to make clear that as part of the terms of the agreement, counsel for the class has agreed not to take a position on whether anybody had a right to opt out. So we've agreed to stay out of this debate.

July 23, 1996 Hearing, Exhibit C. On that same day, Mr. Sellers also stated:

> [so] without taking a position on the issue of opt outs which we're not going to do, counsel for the class are not going to do, I think it's important for the Court to appreciate that there are a lot of people who are interested in this settlement, some of whom have sent letters to the Court.

Id.

At the September 19, 1996 hearing can whether to allow opt outs, when class counsel was asked whether they had anything to say on whether opt outs should be allowed, Michael Madigan responded as follows: "No, Your Honor. We agreed to be silent." September 19, 1996 Hearing, Exhibit D.

At the September 19, 1996 hearing, which Ms. Hutchinson attended, the Court and Mr. Birch, counsel for defendant, had the following dialogue:

> The Court: All right. But I thought there was something in the consent decree, and I don't have the provision, which says that it was silent on opting out?
>
> Mr. Birch: All that says -- no, it's not something in the consent decree. What that means is the parties have agreed not to put language in the consent decree, and *there is a side letter* In which the class counsel said that they would not take a position whether or not a person would be allowed to opt out. . . .

September 19, 1996 Hearing, Exhibit D (emphasis added).

Defendant also notes that a side agreement where class counsel agreed to take no position on the opt out issue was consistent with the procedure followed by the government in other class action suits. *See Eubanks v. Billington*, No. 95-5336, slip op. at 6 (D.C. Cir. April 11, 1997).

Nevertheless, plaintiffs Thomas and Latimer claim that while they knew of the existence of the agreement, they never knew a letter existed memorializing the terms of the agreement. As demonstrated above, however, Barbara Hutchinson, counsel for

plaintiffs Thomas and Latimer, was informed of the existence of the letter by Mr. Birch at the September 19, 1996 Hearing.

Thus, it is unnecessary to supplement the record because the record already demonstrates that a side letter existed. Moreover, the actual language of the side letter does not provide any information that was not already previously disclosed to plaintiffs Thomas and Latimer. Accordingly, plaintiffs Thomas and Latimer could not have been prejudiced by the failure to include the actual letter in the record. Nevertheless, should plaintiffs Thomas and Latimer still desire to supplement the record with the letter itself, defendant does not object.

Respectfully submitted,

/s/

ERIC H. HOLDER, JR., DC BAR #303115

United States Attorney

/s/

JOHN OLIVER BIRCH, DC BAR #234927

Assistant United States Attorney

/s/

CYNTHIA SCHNEDAR, DC BAR #413327

Assistant United States Attorney

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OF COUNSEL:

MELINDA CHANDLER, Esq.

Office of Legal Adviser

Department of State

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 86-2850 (SS)
	)	
MADELEINE K. ALBRIGHT,	)	
	)	
Secretary, Department of State,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S SUPPLEMENTARY RESPONSE TO PLAINTIFFS WALTER THOMAS AND ALAN B.C. LATIMER'S MOTION TO SUPPLEMENT THE PLAINTIFFS' OBJECTIONS TO CONSENT DECREE WITH NEW AND ADDITIONAL EVIDENCE

Defendant files this Supplementary Response to Plaintiffs Walter Thomas and Alan B.C. Latimer's Motion To Supplement The Plaintiffs' Objections To The Consent Decree With New and Additional Evidence in order to add two additional examples of plaintiffs' awareness of the terms of the agreement between class counsel and defendant concerning class counsel's position on opt outs. First, on June 11, 1996, counsel for eighteen plaintiff-intervenors, Theresa L. Watson, filed an opposition to the proposed Consent Decree. That brief was served on class counsel for the plaintiffs, counsel for the defendant, and Ms. Barbara B. Hutchinson, counsel for, among others, Walter Thomas and Alan Latimer. In that opposition, Ms. Watson at page 3 states that:

> [P]laintiffs' counsel in 1995 began to present themselves as "class counsel", agreeing with the

> defendants that there would be no provision for opt outs, which should be available in this type of lawsuit under Rule 23 (b)(3); that they would no longer represent named plaintiffs on this issue in this case or on appeal, and that they would advise this Court that the issue is on appeal in Civil Action No. 82-0400 in the U.S. District Court for the District of Columbia.

Exhibit A. That description is accurate and almost paraphrases the side letter between counsel for the defendants and class counsel. It clearly demonstrates that all parties and the Court were aware of the terms of the side letter at the time the Consent Decree was approved.

Second, at the July 23, 1996 Fairness Hearing, the following exchange took place while counsel were discussing the briefing schedule on the opt out issue:

> Ms. Hutchinson: And the reason the other plaintiffs' counsel are not participating is because they have agreed that they will remain silent. That's my understanding of their position.
>
> Mr. Birch: The class counsel, yes.

Exhibit B. This exchange further demonstrates Ms. Hutchinson's awareness of the agreement between class counsel and defendant on the opt out issue.

Respectfully submitted,

/s/

ERIC H. HOLDER, JR., DC BAR #303115

United States Attorney

/s/

JOHN OLIVER BIRCH, DC BAR #234927

Assistant United States Attorney

/s/
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OF COUNSEL:

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Office of Legal Adviser
Department of State

(4)

Supreme Court, U.S.
FILED
OCT 29 1998
CLERK

DOCKET NO. 98-326

UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
U. S. DEPARTMENT OF STATE
RESPONDENT

PETITIONERS' OBJECTION TO THE AMICUS CURIAE BRIEF OF THE CLASS OF AFRICAN-AMERICAN FOREIGN SERVICE OFFICERS

STATEMENT OF FACTS

On October 20, 1998, Counsel Of Record for Petitioners received a facsimile message from Warren Connelly, counsel for plaintiffs in the district court and court of appeals in this matter, requesting consent to appear in this Court in the status of amicus curiae in this proceeding. Counsel for Petitioners did not consent to the amicus curiae request of Mr. Connelly.

On August 24, 1998, counsel for Petitioners had served the Petition For Certiorari upon Warren Connelly and, as attested in Exhibit A to this Objection, had served the docketing statement upon Mr. Warren Connelly and parties in this action on August 30, 1998. The record in this proceeding reflects that no waiver form has been executed by any Respondents in this action and an extension of time was requested and granted only to the Respondent Madeleine Albright.

The Brief Of Amicus Curiae received on October 26, 1998 contains no Motion For Leave to file as an amicus curiae.

8 pp

ARGUMENT

The Brief Of Amicus Curiae Lacks The Required Motion For Leave To File A Brief As Amicus Curiae[1]

Rule 37.2(a) of the Rules of this Court requires any individual or entity, seeking to file as an amicus curiae, to have the written consent of all parties. Rule 37.2(b) provides that if consent is withheld by a party, a motion for leave to file an amicus curiae brief must be made as a part of the brief at the time of filing. The Brief Of The Class Of African-American Foreign Service Officers served upon counsel for Petitioners is deficient in that it contains no motion for leave to file and consent was not granted by counsel for petitioners. The Brief Of Amicus Curiae should be rejected since it does not comply with Rule 37.2(b).

The Parties Represented By The Amicus Curiae Are Parties To This Action And Have A Direct Interest In The Outcome Of This Proceeding

Rule 12.6 of the Rules of this Court states that all parties other than the petitioners are considered respondents before this Court. In the present case, Avis E. Buchanan and Warren E. Connelly, were counsel for the plaintiffs in this action. In fact, as recently as August 11, 1998, Exhibit B attached hereto and made a part hereof, Mr. Warren E. Connelly, entered into a Consent Order on behalf of the plaintiffs to seal a report under the Consent Decree which is the subject of the

---

[1]On October 28, 1998, counsel for Petitioners was informed by Mr. Warren Connelly that a Motion was being filed by the Amicus Curiae but the Motion had not been received by counsel for Petitioners at the time of the filing of this Objection.

Petition in this case. Although, counsel for plaintiffs in this action continue to hold themselves out as representatives of the plaintiffs and the class which the plaintiffs represented in the district court, Mr. Connelly and Ms. Buchanan come before this court seeking an amicus status which is not warranted nor permitted by the rules. An amicus curiae, as defined by Black's Law Dictionary, is a person or entity with strong views or an interest in an action but not a party to the action. In the present case, Mr. Connelly and Ms. Buchanan, signatories to the Brief Of Amicus Curiae, are counsel for the plaintiffs and the class the plaintiffs represented, and continue to take action on their behalf. The amicus curiae interest which is presented to the Court in the Brief Of Amicus Curiae, p. 2 is more properly that of a respondent as set forth in Rule 12.6. The plaintiffs in this action in the district court were thirty-two named individuals, Pet. app 22a. The class has no standing before a court, except to the extent that individuals may or may not be designated class representatives on behalf of absent class members, see Fed. R. Civ. P. 23 (a)(3) and (4). As stated by the Ninth Circuit in Mandujano v. Basic Vegetable Products, Inc., 541 F. 2d. 832, 834 (9th Cir. 1975), the class is not . . ."[A] legal entity. . . ." The effort of counsel to present its interest as that of an amicus curiae is not supported by the record in this action nor the rules of this Court. The counsel listed on the Brief Of Amicus Curiae were properly served as a Respondents in this action; elected not to file a response in opposition to the

Petition For Certiorari; requested no extension of time; and make no claim at the present time that counsel are not a party to this litigation. In fact, at p. 2, Brief of Amicus Curiae, counsel states that "Amicus Curiae. . .are beneficiaries of the terms and conditions of the classwide settlement. . .," which is the subject of the Petition before this Court. As such, they have a direct interest in the outcome of this proceeding and do not meet the requirements of Rule 37 to file an amicus curiae brief. The efforts of counsel for the plaintiffs to have a dual status in this action is contrary to law and is further support of Petitioners' reasons for the granting of the Writ of Certiorari. The Brief Of Amicus Curiae, although alleging an interest on behalf of class members, states at p. 2, n. 2, that no position will be asserted on behalf of class members as to question 1 set forth in the Petition. The fact that counsel for the plaintiffs and the class which the plaintiffs represent has no position on rights of class members in regard to the issue of opt out under Fed. R. Civ. P. 23, highlights the need for review of the duties of counsel in class actions pursuant to Fed. R. Civ. P. 23. The amicus status, sought by counsel for plaintiffs in this action, is indicative of the urgent need for review by this Court of the rights and duties of parties in class action,

certification only, settlement agreements which are presented to the courts for approval.

CONCLUSION

Based upon the foregoing, the filing of the Brief of the Amicus Curiae should be denied.

Respectfully Submitted,

Barbara B. Hutchinson
Counsel of Record
7907 Powhatan Street
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DOCKET NO. 98-326

UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
RESPONDENT

AFFIDAVIT OF BARBARA B. HUTCHINSON

I, Barbara B. Hutchinson, counsel of record in the above-captioned matter before this Court, swear under penalty of perjury that on August 30, 1998, I mailed, via the United States mail, first class postage attached, the Docketing Statement and appropriate waiver forms supplied by the Office of The Clerk of this Court to the following individuals:

Solicitor General
Of The United States
Room 5614
Department Of Justice
10th St. & Constitution Aves.
Washington, D. C. 20530

Ms. Meredith Manning
Ms. Cynthia Schnedar
Asst. U. S. Attorney
555 Fourth Street, N. W.
Washington, D. C. 20001

Mr. Warren Connelly
Akin, Gump, Strauss,
Hauer & Feld
1333 New Hampshire Avenue,N.W.
Washington, D. C. 20036

Mr. Carl E. Anderson
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH. 44113

Ms. Avis Buchanan
Washington Lawyers' Committee
for Civil Rights & Urban Affairs
1300 Nineteenth Street, N. W.
Washington, D. C. 20036

This 28th day of October, 1998.

Barbara B. Hutchinson

EXHIBIT A

FILED

AUG 25 1998

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER THOMAS, et al.

Plaintiffs,

v.

MADELEINE ALBRIGHT,
Secretary, Department of State

Defendant.

Civil Action 86-2850 (SS)

CONSENT ORDER SEALING THE DEPARTMENT OF STATE'S THIRD REPORT UNDER THE 1996 GLOBAL CONSENT DECREE

The parties hereby stipulate and agree, pursuant to the Court's agreement, that the Department of State's Third Report Under the 1996 Global Consent Decree shall be filed under seal, that counsel for the class may distribute the sealed report to class members, and that class members may not copy the report or disclose its contents to anyone who is not a class member.

Respectfully submitted,

Warren E. Connelly /w/permission mm

WARREN E. CONNELLY, Bar #182345
Akin, Gump, Strauss, Hauer
& Feld, L.L.P.
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MEREDITH MANNING, Bar # 449063
Assistant United States Attorney
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202-514-7190

APPROVED AND SO ORDERED

Dated this 11 day of August, 1998

STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE

(N)

357

EXHIBIT B

DOCKET NO. _____
UNITED STATES SUPREME COURT
OCTOBER TERM 1997

WALTER J. THOMAS, ET. AL,
PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY,
U. S. DEPARTMENT OF STATE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioners' Objection To The Amicus Curiae Brief Of The Class Of African-American Foreign Service Officers in the above captioned matter was served upon all parties to this action, including the Solicitor General Of The United States, by depositing a copy in the United States mail, first class postage attached, addressed to:

Solicitor General Of The
United States
Room 5614
Department Of Justice
10th St. & Constitution Aves.
Washington, D. C. 20530

Mr. Warren Connelly
Akin, Gump, Strauss, Hauer &
Feld
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Ms. Meredith Manning
Ms. Cynthia Schnedar
Assistant U. S. Attorney
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Mr. Carl E. Anderson
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH. 44113

This 29th day of October, 1998.

Barbara B. Hutchinson